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Supreme Court, U.S.
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No. ——

In the Supreme Court of the United States

HOLY SEE,
Petitioner,
v.
JOHN V. DOE,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Respondent John V. Doe seeks to hold petitioner Holy See, a recognized foreign sovereign, vicariously liable for sexual abuse committed by a Catholic priest in Portland, Oregon.

To establish jurisdiction over a foreign sovereign, the tort exception of the Foreign Sovereign Immunities Act of 1976 (FSIA), 28 U.S.C. 1605(a)(5), requires that a plaintiff's injury be caused by the "tortious act" of an "employee of [the] foreign state while acting within the scope of his . . . employment[.]"

This case presents the following question:

> Whether the FSIA's tort exception confers jurisdiction when the tortious act itself falls outside the scope of employment but state law extends vicarious liability based upon non-tortious precursor conduct falling within the scope of employment.

PARTIES TO THE PROCEEDING

In addition to the parties identified in the caption, the following entity is a party in the district court but not in the court of appeals: The Order of the Friar Servants of Mary (The Order of the Friar Servants of Mary, U.S.A., Province, Inc.). Former defendant the Catholic Bishop of Chicago, an Illinois corporation sole, was dismissed on July 15, 2004. Former defendant the Archdiocese of Portland in Oregon, an Oregon corporation sole, was dismissed on September 21, 2004.

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The Holy See,[1] a foreign sovereign, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

INTRODUCTION

The issue presented by this petition is whether a foreign sovereign can be stripped of immunity based upon a state liability rule that conflicts with the FSIA's federal jurisdictional requirements. For the reasons set forth below, the issue is one of vital importance in FSIA jurisprudence.

By its plain language, the FSIA's tort exception requires a foreign state employee's "tortious act" to be within the scope of employment. Because sexual abuse of a minor is outside the scope of a priest's employment as a matter of law, the tort exception does not provide jurisdiction over respondent's vicarious liability claim.

However, relying on Oregon's vicarious liability rule, the Ninth Circuit concluded that the tort exception's jurisdictional requirements were met because non-tortious "necessary precursor" conduct was within the scope of employment and the tortious act was a "direct outgrowth" of such conduct. The Ninth Circuit's expansive "necessary precursor"/"direct outgrowth" approach conflicts with the tort exception's plain language, violates the rule requiring narrow construction of jurisdictional statutes, and conflicts in principle with this Court's holdings in *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S.

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[1] Although the Holy See is known colloquially as the Vatican, Holy See is the correct appellation. *Doe v. Roman Catholic Diocese of Galveston-Houston*, 408 F. Supp. 2d 272, 282 (S.D. Tex. 2005).

428, 441 (1989), *Saudi Arabia v. Nelson*, 507 U.S. 349, 363 (1993), and *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 618 (1992). By its sweeping incorporation of state liability rules, the Ninth Circuit's decision also violates 28 U.S.C. 1606, undermines the uniformity underlying the FSIA, and conflicts in principle with precedent under analogous provisions of the Federal Tort Claims Act (FTCA), including *Laird v. Nelms*, 406 U.S. 797, 798-99 (1972), *Dalehite v. United States*, 346 U.S. 15, 45 (1953), and *Primeaux v. United States*, 181 F.3d 876 (8th Cir. 1999) (en banc).

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-68a) affirming in part and reversing in part the district court's decision is reported at 557 F.3d 1066. The opinion of the district court denying the Holy See's facial motion to dismiss for lack of subject matter jurisdiction (Pet. App. 69a-128a) is reported at 434 F. Supp. 2d 925.

JURISDICTION

The judgment of the court of appeals was entered on March 3, 2009. The Holy See's timely petition for rehearing was denied on March 27, 2009. Pet. App. 129a. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The FSIA, 28 U.S.C. 1602-1611, provides in relevant part as follows:

Section 1605. General exceptions to the jurisdictional immunity of a foreign state
(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case –

. . . .

(5) not otherwise encompassed in paragraph (2) above, in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment; except this paragraph shall not apply to –

(A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused, or

(B) any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights[.]

Section 1606. Extent of liability
As to any claim for relief with respect to which a foreign state is not entitled to immunity under section 1605 or 1607 of this chapter, the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances; but a foreign state except for an

agency or instrumentality thereof shall not be liable for punitive damages[.]

STATEMENT OF THE CASE

A. Nature of the Case

This case involves claims brought by respondent against the Holy See for alleged sexual abuse by parish priest Andrew Ronan in Oregon. The Holy See filed a facial motion to dismiss for lack of subject matter jurisdiction under the FSIA. Over the course of district court and appellate proceedings, all of respondent's claims against the Holy See were dismissed for lack of jurisdiction except one: the Holy See's alleged vicarious liability for Ronan's sexual abuse of respondent in "the monastery and surrounding areas in Portland, Oregon" in 1965-1966. Pet. App. 140a, 147a-149a (Amended Complaint ¶¶ 15, 34-38).

B. Oregon *Respondeat Superior* Law

Ninth Circuit cases have held that state law governs whether an act is within the scope of employment for purposes of the FSIA's tort exception. *See, e.g., Randolph v. Budget Rent-A-Car*, 97 F.3d 319, 326-27 (9th Cir. 1996). The Oregon Supreme Court has held that "[t]hree requirements must be met to conclude that an employee was acting within the scope of employment[:]"

> (1) whether the act occurred substantially within the time and space limits authorized by the employment;

> (2) whether the employee was motivated, at least partially, by a purpose to serve the employer; and
>
> (3) whether the act is of a kind which the employee was hired to perform.

Chesterman v. Barmon, 753 P.2d 404, 406 (Or. 1988) (citations omitted).

In *Chesterman*, the Oregon Supreme Court held for the first time that a corporation's *respondeat superior* liability could be extended even where the tortious act itself did not satisfy Oregon's three-factor scope-of-employment test. *Chesterman* involved an employee who had ingested a drug while acting within the scope of his employment, leading to hallucinations that resulted in sexual assault. *Chesterman*, 753 P.2d at 406. Because the employee's acts of entering the plaintiff's house and of sexual assault "were outside the authorized limits of time and space, were not motivated by a purpose to serve the employer and were not of a kind which [the employee] was hired to perform[,]" the *Chesterman* court held that they "were, as a matter of law, outside the scope of employment." *Id.*; *see also Fearing v. Bucher*, 977 P.2d 1163, 1166 (Or. 1999) (citing *Chesterman*, 753 P.2d at 406) (stating that the *Chesterman* court "held that the intentional tort itself, the sexual assault, unquestionably was outside the scope of employment"). However, the court held that the corporation still could "be found vicariously liable . . . if *other* acts which were within [the employee's] scope of employment resulted in the acts which led to injury to plaintiff." *Chesterman*, 753 P.2d at 406 (emphasis in original). Finding that the ingestion of the drug – the act preceding the tortious act itself – could satisfy all three

of the scope-of-employment factors, the Oregon Supreme Court permitted the vicarious liability claim to proceed under state law. *Id.* at 406-07.

The Oregon Supreme Court applied the *Chesterman* vicarious liability rule in *Fearing*, a Catholic priest child sexual abuse case against the Portland Archdiocese involving allegations "very similar" to those made by respondent. Pet. App. 34a (panel decision). Like *Chesterman*, the *Fearing* court held that the fact that the tortious act itself was outside the scope of employment did not preclude a finding of vicarious liability:

> As in *Chesterman,* [the priest's] alleged sexual assaults on plaintiff clearly were outside the scope of his employment, but our inquiry does not end there. The Archdiocese still could be found vicariously liable, if acts that were within [the priest's] scope of employment "resulted in the acts which led to injury to plaintiff."

Fearing, 977 P.2d at 1166 (quoting *Chesterman*, 753 P.2d at 406). *Fearing* then engaged in the "inquiry" required under *Chesterman*: whether the precursor acts – *i.e.*, the acts preceding the sexual assault – were within the scope of employment. *Id.* at 1166-68. Finding that the priest's precursor conduct satisfied the second and third factors of the scope-of-employment test, the court concluded that "[a] jury reasonably could infer that [the priest's] performance of his pastoral duties with respect to plaintiff and his family were a necessary precursor to the sexual abuse and that the assaults thus were a direct outgrowth of and were engendered by conduct that was within the scope of [the priest's] employment." *Id.* at 1168; *see also id.* at 1169 (Archdiocese's "*vicarious liability* is

based on conduct that occurred before the abuse") (emphasis in original). The sexual abuse itself, however, remained outside the scope of employment. *Id.* at 1166; *see also, e.g.*, *Schmidt v. Archdiocese of Portland*, 180 P.3d 160, 177 (Or. App. 2008) (citing *Chesterman*, 753 P.2d at 406) (holding that "the alleged sexual assault was not within the scope of [the priest's] employment"), *review allowed on other grounds*, 195 P.3d 911 (Or. Oct. 15, 2008) (Nos. A124850, S056261).[2]

C. Relevant Proceedings Below

The Holy See's motion to dismiss respondent's vicarious liability claim relied on the language of the FSIA's tort exception, which requires in relevant part that a plaintiff's injury be caused by the "tortious act" of an "employee of [the] foreign state while acting within the scope of his . . . employment." 28 U.S.C. 1605(a)(5). Because the Oregon Supreme Court has held that sexual abuse of a minor is "clearly" outside the scope of a Catholic priest's employment, *Fearing*, 977 P.2d at 1166, the Holy See argued that the district court lacked subject matter jurisdiction over respondent's vicarious liability claim.

The district court disagreed. Relying on language from *Joseph v. Office of Consulate Gen. of Nigeria*, 830 F.2d 1018, 1025 (9th Cir. 1987), the district court held that "'[t]he 'scope of employment' provision of the tortious activity exception essentially requires a

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[2] Sexual abuse of a minor by a priest is outside the scope of employment under Oregon law because it is not motivated to serve the employer (second scope-of-employment factor) and is not the kind of act which the priest was hired to perform (third scope-of-employment factor). *Cf. Chesterman*, 753 P.2d at 406.

finding that the doctrine of respondeat superior applies to the tortious acts of individuals.'" Pet. App. 111a. Citing *Fearing*, the district court held that "Oregon has adopted an expansive theory of 'scope of employment' in which an employer is liable not only for the torts of his employee when the employee is acting within the scope of his employment, but also for the intentional criminal acts of employees if the acts that lead to the criminal conduct were within the scope of employment." *Id.* (citations omitted). The district court concluded that the tort exception's requirements were met because respondent "has sufficiently alleged facts showing that Ronan's conduct preceding the sexual abuse fell within the scope of his employment" (*id.* at 112a) and thus had alleged "sufficient grounds upon which to hold Ronan's employer liable under a theory of respondeat superior." *Id.* at 113a.

The Ninth Circuit agreed with the district court. Like the district court, the court of appeals stated that the tort exception's "scope of employment" provision "'essentially requires a finding that the doctrine of respondeat superior applies to the tortious acts of individuals.'" Pet. App. 31a-32a (quoting *Joseph*, 830 F.2d at 1025). Referring to *Fearing*, the court stated that "the Oregon Supreme Court has directly addressed whether a church can be liable under respondeat superior for the actions of a priest who sexually assaults a parishioner." *Id.* at 32a. The court acknowledged that "*Fearing* stated that the priest's 'alleged sexual assaults on plaintiff clearly were outside the scope of his employment under the traditional test'" but noted that the scope of employment "inquiry" under *Fearing* did not end there. *Id.* at 33a (quoting *Fearing*, 977 P.2d at 1166). Instead, a putative employer could still be liable under Oregon law if "'acts that *were* within [the priest's] scope of

employment resulted in the acts which led to injury to [the] plaintiff.'" *Id.* (emphasis in original) (quoting *Fearing*, 977 P.2d at 1166). The court of appeals concluded that, under Oregon law, "[a]n intentional tort is within the scope of employment, and can support respondeat superior liability for the employer, if conduct that was within the scope of employment was 'a necessary precursor to the' intentional tort and the intentional tort was 'a direct outgrowth of . . . conduct that was within the scope of . . . employment.'" *Id.* at 34a (quoting *Fearing*, 977 P.2d at 1168). Finding that respondent had alleged the precursor conduct required under Oregon law – *i.e.*, Ronan acting as respondent's "priest, counselor and spiritual adviser" (*id.* at 34a) – the court of appeals concluded that the Holy See is "not immune from [respondent's] respondeat superior claim." *Id.* at 35a.

REASONS FOR GRANTING THE WRIT

Congress explicitly required a "tortious act" to be within the scope of employment under the tort exception. Because sexual abuse of a minor is outside the scope of a priest's employment, there is no jurisdiction over respondent's vicarious liability claim. The court of appeals' finding of jurisdiction in the absence of a tortious act falling within the scope of employment conflicts with the FSIA's plain language and principles underlying the FSIA's statutory scheme, including that only a jurisdictionally-significant act or activity attributable to a foreign sovereign can strip a foreign sovereign of its immunity from suit.

The Ninth Circuit found jurisdiction because "necessary precursor" conduct was within the scope of Ronan's alleged employment and the sexual abuse was

a "direct outgrowth" of such conduct. The Ninth Circuit's expansive "necessary precursor"/"direct outgrowth" approach violates the FSIA's plain language and conflicts in principle with this Court's holdings in *Amerada Hess* and *Nelson*, where this Court rejected similar approaches to jurisdiction under the FSIA. The Ninth Circuit's approach is also inconsistent with *Weltover*, where this Court held that courts should not incorporate "unexpressed" jurisdictional requirements into the FSIA. As this Court has held both within and outside the context of the FSIA, federal jurisdictional statutes must be narrowly construed. The Ninth Circuit's expansion of the FSIA's jurisdictional reach by judicial decree conflicts with this basic principle of statutory interpretation.

The Ninth Circuit's unbridled incorporation of Oregon's vicarious liability rule also violates section 1606, which applies substantive liability rules only where a foreign state is already held to lack immunity. In the analogous FTCA context, this Court in *Dalehite* and *Laird* required adherence to the limits imposed by federal statutory jurisdictional requirements against conflicting state liability rules, notwithstanding that the FTCA explicitly incorporates substantive liability rules into the immunity determination itself. Allowing state liability rules to govern the federal jurisdictional inquiry – contrary to the FSIA's explicit requirements – defeats one of the central purposes of the FSIA, namely to create "a uniform body of law concerning the amenability of a foreign sovereign to suit in United States courts." *First Nat'l City Bank v. Banco Para El Comercio Exterior De Cuba (Bancec)*, 462 U.S. 611, 622 n.11 (1983).

I. By Finding that Jurisdiction Lies Even When the Tortious Act Itself is Outside the Scope of Employment, the Ninth Circuit's Decision Conflicts With the Tort Exception's Plain Language, Disrupts the FSIA's Statutory Scheme, and Undercuts the International Doctrine of Foreign Sovereign Immunity

a. The tort exception's plain language requires that a plaintiff's injury be caused by the "tortious act" of an "employee of [the] foreign state while acting within the scope of his . . . employment." 28 U.S.C. 1605(a)(5); *see also Permanent Mission of India to the United Nations v. City of New York*, 127 S. Ct. 2352, 2356 (2007) ("We begin, as always, with the text of the statute."). Circuit courts agree that the exception requires the tortious act itself to be within the scope of employment. *See O'Bryan v. Holy See*, 556 F.3d 361, 385 (6th Cir. 2009) (holding under Kentucky law that the tort exception does not apply to claims against the Holy See for clergy sexual abuse because "the alleged acts of sexual abuse were not done while the alleged tortfeasors were acting within the scope of employment"), *petition for cert. filed*, 77 U.S.L.W. 3645 (U.S. May 7, 2009) (No. 08-1384); *Moore v. United Kingdom*, 384 F.3d 1079, 1088 n.11 (9th Cir. 2004) ("statute provides jurisdiction only for scope-of-employment torts."); *Moran v. Kingdom of Saudi Arabia*, 27 F.3d 169, 173 (5th Cir. 1994) (holding that the tort "exception can only be met if the officer or employee of the foreign state was acting within the scope of his employment at the time he committed the tortious act or omission."); *see also* H.R. REP. NO. 94-1487, at 21 (1976) (stating that the tort exception denies immunity for claims for personal injury "caused

by the tortious act" of foreign state employees "acting within the scope of their authority").[3]

b. The tortious act underlying respondent's vicarious liability claim is the alleged sexual abuse. Pet. App. 148a (Amended Complaint ¶ 36); Pet. App. 8a (panel decision) (stating that respondent "alleged that the Holy See was vicariously liable for Ronan's abuse of [respondent]"); *see also Fearing*, 977 P.2d at 1169 ("The action here clearly is *based on* child abuse: Were it not for [the priest's] alleged sexual abuse of plaintiff, there would be no action. . . . The fact that the Archdiocese's *vicarious liability* is based on conduct that occurred before the abuse does not alter the nature of the underlying action.") (emphasis in original). As set forth above, the Oregon Supreme Court held that sexual abuse of a minor is "clearly" outside the scope of a priest's employment. *Fearing*, 977 P.2d at 1166; *Chesterman*, 753 P.2d at 406; *see also Schmidt*, 180 P.3d at 177; *Bray v. Am. Prop. Mgmt. Corp.*, 988 P.2d 933, 935 (Or. App. 1999) (stating that *Fearing* court recognized that "the tortious act was not itself within the scope of the employment"); *JC2 v. Grammond*, 232 F. Supp. 2d 1166, 1169 (D. Or. 2002) (*Chesterman* court "recognized that the sexual assault itself was outside the scope of employment"); William W. Bassett, *Religious Organizations and the Law* § 8:34 (2008) ("The Oregon Supreme Court [in *Fearing*] agreed that the priest's sexual assaults were 'clearly outside the

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[3] This Court has reached the same conclusion under similar language in the FTCA. *See infra* at 26; *see also Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 117 (2001) ("A variable standard for interpreting common, jurisdictional phrases would contradict our earlier cases and bring instability to statutory interpretation.").

scope of employment.'").[4] The Oregon Supreme Court's holding is consistent with the overwhelming consensus of state and federal courts that sexual abuse is not within the scope of a priest or pastor's employment. *See Tichenor v. Roman Catholic Church*, 32 F.3d 953, 960 (5th Cir. 1994) ("It would be hard to imagine a

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[4] The Ninth Circuit was bound to follow the clear holding of *Fearing*, the Oregon Supreme Court case directly on point. *See Riley v. Kennedy*, 128 S. Ct. 1970, 1985 (2008) ("A State's highest court is unquestionably the ultimate exposito[r] of state law."). However, notwithstanding *Fearing*, the Ninth Circuit opinion at one point states that *Minnis v. Oregon Mut. Ins. Co.*, 48 P.3d 137 (Or. 2002) "makes clear" that sexual abuse of a minor is within the scope of a priest's employment. Pet. App. 34a. *Minnis*, an insurance case involving a pizzeria, did not overturn *Fearing*'s unambiguous holding that sexual abuse of a minor is "clearly" outside the scope of a priest's employment. Instead, *Minnis* held that the sexual assault by the pizzeria manager was outside the scope of his employment, made clear that *Fearing* examines whether precursor acts are within the scope, and simply limited the *Fearing* vicarious liability rule to acts within the time and space of employment. *Minnis*, 48 P.3d at 143, 145. Moreover, a recent post-*Minnis* Oregon court of appeals case reiterated the *Fearing* rule with respect to sexual abuse of a minor by a Catholic priest. *See Schmidt*, 180 P.3d at 174-77 (discussing *Chesterman*, *Fearing* and *Minnis*, and holding based upon *Chesterman* that "the alleged sexual assault was not within the scope of [the priest's] employment"); *see also Gooding v. Wilson*, 405 U.S. 518, 526 n.3 (1972) (federal courts follow holdings of state court of appeals as to state law). Finally, the Ninth Circuit based jurisdiction on precursor conduct in this case. *See* Pet. App. 34a (finding that respondent's allegations meet the "necessary precursor"/"direct outgrowth" "standard"); *id.* (relying on the precursor conduct of respondent coming "to know Ronan as his priest, counselor and spiritual adviser"). By substituting precursor conduct for the tortious act under the tort exception's scope of employment inquiry, the Ninth Circuit ran afoul the statutory provisions and precedent set forth in this petition.

more difficult argument than that [the priest's] illicit sexual pursuits were somehow related to his duties as a priest or that they in any way furthered the interests of . . . his employer."); *O'Bryan*, 556 F.3d at 385 (Kentucky law); *Schovanec v. Archdiocese of Oklahoma City*, 188 P.3d 158, 161 (Okla. 2008) (Oklahoma law); *Doe v. Liberatore*, 478 F. Supp. 2d 742, 758 (M.D. Pa. 2007) (Pennsylvania law); *Paul J.H. v. Lum*, 736 N.Y.S.2d 561, 561 (N.Y. App. Div. 2002) (New York law); *Tercero v. Roman Catholic Diocese of Norwich*, 48 P.3d 50, 58 (N.M. 2002) (New Mexico law); *C.J.C. v. Corp. of Catholic Bishop of Yakima*, 985 P.2d 262, 272 (Wash. 1999) (Washington law); *Gibson v. Brewer*, 952 S.W.2d 239, 246 (Mo. 1997) (Missouri law); *Alpharetta First United Methodist Church v. Stewart*, 472 S.E.2d 532, 535-36 (Ga. Ct. App. 1996) (Georgia law); *Kennedy v. Roman Catholic Diocese of Burlington*, 921 F. Supp. 231, 233-34 (D. Vt. 1996) (Vermont law); *L.L.N. v. Clauder*, 552 N.W.2d 879, 888 (Wis. Ct. App. 1996) (Wisconsin law), *rev'd on other grounds*, 563 N.W.2d 434 (Wisc. 1997); *Dausch v. Rykse*, 52 F.3d 1425, 1435-36 (7th Cir. 1994) (Illinois law); *Byrd v. Faber*, 565 N.E.2d 584, 588 (Ohio 1991) (Ohio law); *Destefano v. Grabrian*, 763 P.2d 275, 287 (Colo. 1988) (Colorado law); *Doe v. O'Connell*, No. C.A. NO. 86-0077, 1988 WL 1016799, at *7 (R.I. Super. Jan. 28, 1988) (Rhode Island law); *Rita M. v. Roman Catholic Archbishop*, 232 Cal. Rptr. 685, 690 (Cal. Ct. App. 1986) (California law).[5]

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[5] This result is not limited to cases involving priests or pastors. The accepted rule in a wide range of contexts is that sexual abuse or assault is not within the scope of employment. *See, e.g.*, *Andrews v. United States*, 732 F.2d 366, 370 (4th Cir. 1984) (South Carolina law; physician's assistant); *Doe v. Swift*, 570 So. 2d 1209, 1213 (Ala. 1990) (Alabama law; psychologist); *Porter v. Harshfield*,

c. The tort exception requires that an employee commit the "tortious act . . . while acting within the scope of his . . . employment." 28 U.S.C. 1605(a)(5). Given that sexual abuse of a child is outside the scope of a priest's employment as a matter of law, jurisdiction does not lie over respondent's vicarious liability claim under the tort exception. The Ninth Circuit's decision to the contrary – which permits jurisdiction even though the tortious act is outside the scope of employment – violates the tort exception's plain language.

d. By permitting jurisdiction to lie in the absence of a jurisdictionally-significant act within the scope of authority or employment, the Ninth Circuit's approach also disrupts the FSIA's statutory scheme. An act or activity attributable to the sovereign is required to strip immunity under all of the FSIA exceptions. *See Phaneuf v. Republic of Indonesia*, 106 F.3d 302, 308 (9th Cir. 1997) (stating that "the foreign state retains its immunity when its agent acts outside the scope of his authority" and holding that apparent authority is insufficient to confer jurisdiction under commercial

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948 S.W.2d 83, 86 (Ark. 1997) (Arkansas law; radiology technician); *Sharples v. State*, 793 P.2d 175, 177 (Hawaii 1990) (Hawaii law; psychiatrist); *Godar v. Edwards*, 588 N.W.2d 701, 707 (Iowa 1999) (Iowa law; school district's curriculum director); *Doe v. Westlake Acad.*, 12 Mass. L. Rptr. 353, 2000 WL 1724887 (Mass. Super. 2000) (Massachusetts law; mental illness program employee); *Bozarth v. Harper Creek Bd. of Ed.*, 288 N.W.2d 424, 426 (Mich. Ct. App. 1979) (Michigan law; teacher); *Maguire v. State*, 835 P.2d 755, 758 (Mont. 1992) (Montana law; developmental center employee); *Cosgrove v. Lawrence*, 522 A.2d 483, 484-85 (N.J. Super. Ct. App. Div. 1987) (New Jersey law; therapist); *Medlin v. Bass*, 398 S.E.2d 460, 464 (N.C. 1990) (North Carolina law; school principal); *Birkner v. Salt Lake County*, 771 P.2d 1053, 1058 (Utah 1989) (Utah law; therapist).

activity exception); *Velasco v. Gov't Of Indonesia*, 370 F.3d 392, 400 (4th Cir. 2004) (agreeing with Ninth Circuit that actual authority is required to confer jurisdiction under commercial activity exception); *Dale v. Colagiovanni*, 443 F.3d 425, 429 (5th Cir. 2006) (same); *Chuidian v. Philippine Nat'l Bank*, 912 F.2d 1095, 1103-05 (9 h Cir. 1990) (waiver exception only applies if the foreign state defendant himself waived immunity); *Zappia Middle East Const. Co. v. Emirate of Abu Dhabi*, 215 F.3d 247, 252 (2d Cir. 2000) (holding, under expropriation exception, that acts of another entity "cannot be attributed to a government that has not authorized the private entity to act on its behalf."); *In re Republic of Philippines*, 309 F.3d 1143, 1150 (9th Cir. 2002) (stating, under immovable property exception, that "[t]he FSIA's exceptions focus on actions taken by or against a foreign sovereign."); 28 U.S.C. 1605(a)(6) (jurisdiction over actions to enforce an arbitration agreement limited to agreements "made by the foreign state"); 28 U.S.C. 1605A(a)(1) (requiring "official, employee, or agent" to be "acting within the scope of his or her office, employment, or agency" under terrorism exception). The Ninth Circuit's holding that jurisdiction can lie over a foreign sovereign even though there is no jurisdictionally-significant act within the scope of employment consequently undermines a central principle underlying the FSIA's statutory framework.

e. The Ninth Circuit's approach not only disrupts foreign sovereign immunity in the United States. As this Court recently reaffirmed, foreign sovereign immunity derives in part from "'fair dealing'" and "'reciprocal self-interest.'" *Republic of Philippines v. Pimentel*, 128 S. Ct. 2180, 2190 (2008) (quoting *Nat'l City Bank of N.Y. v. Republic of China*, 348 U.S. 356, 362 (1955)). When a United States court denies a

foreign state immunity in the absence of a jurisdictionally-significant act attributable to the sovereign itself, the United States government faces potentially the same vast expansion of jurisdiction in foreign courts. *See De Sanchez v. Banco Central de Nicaragua*, 770 F.2d 1385, 1398 (5th Cir. 1985) ("In the field of international law, where no single sovereign reigns supreme, the Golden Rule takes on added poignancy."). Once the loss of foreign sovereign immunity is disconnected from acts attributable to the sovereign, the international doctrine of foreign sovereign immunity is severely undercut.

II. The Ninth Circuit's Decision to Confer Jurisdiction Based Upon Non-Tortious Precursor Conduct Violates the Tort Exception's Plain Language, Conflicts in Principle with this Court's Precedent, and Expands the FSIA's Jurisdictional Reach By Judicial Decree

Notwithstanding the plain language of the statute and the Oregon Supreme Court's holding in *Fearing*, the Ninth Circuit found jurisdiction over respondent's vicarious liability claim under Oregon law because "necessary precursor" conduct was within the scope of employment and the tortious act was a "direct outgrowth" of such conduct. Pet. App. 34a.

a. As set forth above, the tort exception's plain language requires the "tortious act" to be within the scope of employment. 28 U.S.C. 1605(a)(5). Conduct preceding the tortious act does not satisfy the exception's explicit requirement. Accordingly, the Ninth Circuit's "necessary precursor"/"direct outgrowth" approach conflicts with the tort exception's requirements.

b. The Ninth Circuit's approach also conflicts in principle with this Court's holdings in *Amerada Hess*, *Nelson* and *Weltover*. As Chief Justice Rehnquist's majority opinion in *Amerada Hess* recognized, Congress knew how to base jurisdiction on a "direct outgrowth" theory when it wanted to:

> Under the commercial activity exception to the FSIA, § 1605(a)(2), a foreign state may be liable for its commercial activities "outside the territory of the United States" having a "direct effect" inside the United States. But the noncommercial tort exception, § 1605(a)(5), upon which respondents rely, makes no mention of "territory outside the United States" or of "direct effects" in the United States. Congress' decision to use explicit language in § 1605(a)(2), and not to do so in § 1605(a)(5), indicates that the exception in § 1605(a)(5) covers only torts occurring within the territorial jurisdiction of the United States.

Amerada Hess, 488 U.S. at 441 (footnote omitted); *Persinger v. Islamic Republic of Iran*, 729 F.2d 835, 843 (D.C. Cir. 1984) ("Any mention of 'direct effect[s]' is noticeably lacking from the noncommercial tort exception. When Congress uses explicit language in one part of a statute to cover a particular situation and then uses different language in another part of the same statute, a strong inference arises that the two provisions do not mean the same thing."). As applied to the circumstances here, Congress' decision to use explicit "direct effect" language in section 1605(a)(2) and not in 1605(a)(5) demonstrates that a "direct outgrowth" theory – the theory relied upon by the

Ninth Circuit – is not permitted under the FSIA's tort exception.

The Ninth Circuit's "necessary precursor" theory poses similar problems. Congress knows how to base jurisdiction on precursor acts: the terrorism exception, for example, confers jurisdiction for "the provision of material support or resources" by a foreign official, employee or agent. 28 U.S.C. 1605A(a)(1). However, the tort exception is silent as to jurisdiction based on precursor acts. And, in *Nelson*, this Court rejected reliance on acts preceding an intentional tort to establish jurisdiction under the FSIA:

> The Nelsons allege that, at the time petitioners recruited Scott Nelson and thereafter, they failed to warn him of the possibility of severe retaliatory action if he attempted to disclose any safety hazards he might discover on the job. In other words, petitioners bore a duty to warn of their own propensity for tortious conduct. But this is merely a semantic ploy. For aught we can see, a plaintiff could recast virtually any claim of intentional tort committed by sovereign act as a claim of failure to warn, simply by charging the defendant with an obligation to announce its own tortious propensity before indulging it. To give jurisdictional significance to this feint of language would effectively thwart the Act's manifest purpose to codify the restrictive theory of foreign sovereign immunity.

Nelson, 507 U.S. at 363 (citations omitted). Circuit courts agree that precursor acts do not serve as substitutes for the jurisdictionally-significant acts required under the statute. *See, e.g., Gerding v. Republic of France*, 943 F.2d 521, 527 (4th Cir. 1991)

(quoting *Zedan v. Kingdom of Saudi Arabia*, 849 F.2d 1511, 1513 (D.C. Cir. 1988)) (jurisdiction under commercial activity exception not intended to be based upon "'merely precursors to commercial transactions.'"); *Asociacion de Reclamantes v. United Mexican States*, 735 F.2d 1517, 1524-25 (D.C. Cir. 1984) (Scalia, J.) (non-tortious precursor acts in the United States could not satisfy tort exception's situs requirement).

The Ninth Circuit's approach also conflicts in principle with this Court's decision in *Weltover*. The *Weltover* Court overturned a line of circuit cases that had required that a "direct effect" under the FSIA's commercial activity exception be both "substantial" and "foreseeable." Justice Scalia, writing for the majority, rejected "the suggestion that § 1605(a)(2) contains any unexpressed requirement of 'substantiality' or 'foreseeability.'" *Weltover*, 504 U.S. at 618. Given that any "necessary precursor"/"direct outgrowth" theory is similarly "unexpressed" in the tort exception, the Ninth Circuit's expansive reading of the FSIA's tort exception is inconsistent with *Weltover*.

c. *Amerada Hess*, *Nelson* and *Weltover* reflect this Court's narrow reading of jurisdictional statutes. *See Amerada Hess*, 488 U.S. at 434 (quoting *Cary v. Curtis*, 44 U.S. (3 How.) 236, 245 (1845)) ("We start from the settled proposition that the subject-matter jurisdiction of the lower federal courts is determined by Congress 'in the exact degrees and character which to Congress may seem proper for the public good.'"). In fact, courts have repeatedly held that the FSIA's jurisdictional provisions must be "narrowly construed." *Haven v. Polska*, 215 F.3d 727, 731 (7th Cir. 2000); *see also MacArthur Area Citizens Ass'n v. Republic of Peru*, 809 F.2d 918, 921 (D.C. Cir. 1987) ("the

legislative history counsels that the [tort] exception should be narrowly construed so as not to encompass the farthest reaches of common law."); *Asociacion de Reclamantes*, 735 F.2d at 1521 (stating that "[o]ur job . . . is not to give the term [rights in immovable property under 28 U.S.C. 1605(a)(4)] the most expansive reading possible").

d. Permitting jurisdiction under the tort exception pursuant to a "necessary precursor"/"direct outgrowth" theory – when such an approach has no basis in the tort exception's language – fails to comply with this established principle of narrow construction. Instead, contrary to this Court's precedent, the Ninth Circuit's reliance on Oregon's "necessary precursor"/"direct outgrowth" approach constitutes a vast and unwarranted expansion of FSIA jurisdiction by judicial decree. *See Stoneridge Inv. Partners, LLC v. Scientific-Atlanta*, 128 S. Ct. 761, 773 (2008), *quoting American Fire & Cas. Co. v. Finn*, 341 U.S. 6, 17 (1951) ("'[t]he jurisdiction of the federal courts is carefully guarded against expansion by judicial interpretation'") (brackets in original); *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 377 (1994) ("Federal courts are courts of limited jurisdiction. They possess only that power authorized by Constitution and statute, which is not to be expanded by judicial decree.") (citations omitted).

III. The Ninth Circuit's Adoption of Oregon's Vicarious Liability Rule for Jurisdictional Purposes Violates Section 1606, Conflicts in Principle with this Court's Precedent Under the FTCA, and Undermines the Principle of Uniformity Underlying the FSIA

a. Jurisdiction also cannot be premised on the basis that the tort exception's scope of employment provision "'essentially requires a finding that the doctrine of respondeat superior applies to the tortious acts of individuals.'" Pet. App. 31a-32a (panel decision) (quoting *Joseph*, 830 F.2d at 1025). Section 1606 explicitly provides that a foreign state is liable to the same extent as individuals only after a court has determined that an exception to immunity applies. *See* 28 U.S.C. 1606 ("As to any claim for relief *with respect to which a foreign state is not entitled to immunity under section 1605* or 1607 of this chapter, the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances") (emphasis added); *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 488-89 (1983) (quoting 28 U.S.C. 1606) ("*When one of these or the other specified exceptions applies*, 'the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances'") (emphasis added); *Price v. Socialist People's Libyan Arab Jamahiriya*, 384 F. Supp. 2d 120, 132 (D.D.C. 2005) (quoting 28 U.S.C. 1606) ("Once a foreign state's immunity has been lifted under section 1605 and jurisdiction is proper, section 1606 provides that 'the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances.'"); *see also* H.R. REP. NO.

94-1487, at 22 ("Section 1606 *makes clear that if the foreign state . . . is not entitled to immunity from jurisdiction*, liability exists as it would for a private party under like circumstances") (emphasis added). By providing that a foreign state is not immune merely because liability would attach, the approach adopted by the district court and the Ninth Circuit conflicts with section 1606 and impermissibly collapses the federal jurisdictional scope-of-employment inquiry entirely into one of state liability law. Had Congress wanted to turn the tort exception inquiry into one of mere liability under state law, it easily could have done so – as its use of the term "liable" in other portions of the FSIA demonstrates. *See* 28 U.S.C. 1606; 1605A(c); *see also 62 Cases of Jam v. United States*, 340 U.S. 593, 596 (1951) ("Congress expresses its purpose by words. It is for us to ascertain – neither to add nor to subtract, neither to delete nor to distort.").

This conclusion is consistent with this Court's prior *dictum* regarding liability rules in suits involving foreign states. *See Bancec*, 462 U.S. at 622 n.11 (after concluding that instrumentality was not entitled to immunity, stating that "where state law provides a rule of liability governing private individuals, the FSIA requires the application of that rule to foreign states in like circumstances"); *Amerada Hess*, 488 U.S. at 439-40 (citing H.R. REP. NO. 94-1487, at 14, 20-21) ("Congress' primary purpose in enacting § 1605(a)(5) was to eliminate a foreign state's immunity for traffic accidents and other torts committed in the United States, for which liability is imposed under domestic tort law."). The *Bancec* Court's statement was in the context of a liability determination; the Court had already concluded earlier in the opinion that the foreign state instrumentality lacked immunity under section 1607(c). *See Bancec*, 462 U.S. at 620-21

(discussing immunity); *compare id.* at 621-33 (addressing instrumentality's liability for foreign state's acts). The *Amerada Hess* Court, in turn, cited a portion of the FSIA legislative history that makes it clear that the tortious act itself must be within the scope of employment for purposes of the immunity inquiry. *See* H.R. REP. NO. 94-1487, at 21 (stating that the tort exception "denies immunity as to claims for personal injury . . . caused by the tortious act or omission of a foreign state or its officials or employees, acting within the scope of their authority"). Neither *Bancec* nor *Amerada Hess* ever suggests that a foreign sovereign should be stripped of immunity based on a state liability rule inconsistent with the FSIA's plain jurisdictional requirements. In fact, this Court has squarely held that courts making an immunity determination under the FSIA's exceptions "must apply the detailed *federal* law standards set forth in the act." *Verlinden*, 461 U.S. at 493-94 (emphasis added); *see also id.* at 498 (stating that "deciding whether statutory subject matter jurisdiction exists under the Foreign Sovereign Immunities Act entails an application of the substantive terms of the Act to determine whether one of the specified exceptions to immunity applies").

b. Any doubt regarding whether section 1606 precludes the wholesale incorporation of state liability laws into the tort exception is resolved by comparing the FSIA with section 1346(b) of the FTCA.[6] As stated above, the FSIA's tort exception provides for jurisdiction over claims based on the tortious act of a foreign state employee "acting within the scope of his

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[6] The FSIA's tort exception was based in part upon the FTCA. H.R. REP. NO. 94-1487, at 21.

. . . employment[.]" 28 U.S.C. 1605(a)(5). By contrast, the FTCA provides for jurisdiction over claims based on the "negligent or wrongful act" of a federal employee "while acting within the scope of his office or employment, *under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act . . . occurred*." 28 U.S.C. 1346(b) (emphasis added). Whereas the FSIA provides for the application of liability rules only after the foreign state's lack of immunity is established, the FTCA explicitly provides for the use of such rules in the immunity determination itself.

And yet, notwithstanding the FTCA's "liab[ility]" language, this Court has held even under the FTCA that a state liability rule must give way to the FTCA's jurisdictional requirements. In *Dalehite v. United States*, 346 U.S. 15 (1953), the Court rejected application of a state absolute liability theory against the federal government because the FTCA "requires a negligent act." *Id.* at 45, *overruled on other grounds by Rayonier, Inc. v. United States*, 352 U.S. 315 (1957). Similarly, in *Laird v. Nelms*, 406 U.S. 797, 798-99 (1972), this Court rejected application of a state liability rule conflicting with the FTCA's jurisdictional requirements. Then-Justice Rehnquist's majority opinion held that the "necessary consequence of the Court's holding in *Dalehite* is that the [FTCA] statutory language 'negligent or wrongful act or omission of any employee of the Government,' is a uniform federal limitation on the types of acts committed by its employees for which the United States has consented to be sued." *Id.* at 799. The Court

held that the FTCA's language controlled "[r]egardless of state law characterization[.]" *Id.*[7]

This Court has also explained that the FTCA's "scope of employment" requirement is jurisdictional and constitutes one of the six "elements" that renders a claim "actionable" under the FTCA. *FDIC v. Meyer*, 510 U.S. 471, 477 (1994); *see also Sheridan v. United States*, 487 U.S. 392, 401 (1988) ("The tortious conduct of an off-duty serviceman, not acting within the scope of his office or employment, does not in itself give rise to Government liability whether that conduct is intentional or merely negligent."); *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 424 (1995) (holding the "'[s]cope of employment' sets the line" under 28 U.S.C. 2679(b)(1)). The settled rule is that the FTCA's scope of employment requirement limits the state liability theories that can be used to confer jurisdiction against the federal government. *See Primeaux v. United States*, 181 F.3d 876, 878 (8th Cir. 1999) (en banc) ("even if state law extends a private employer's vicarious liability to employee conduct not within the scope of employment, the government's FTCA liability remains limited to employee [tortious] conduct within the scope of employment, as defined by state law."); *Johnson v. United States*, 534 F.3d 958, 963 (8th Cir. 2008) ("FTCA claims are strictly limited

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[7] Under basic comity principles, settled precedent under the FTCA holding that federal statutory jurisdictional language controls against conflicting state liability rules should be applied under the FSIA. *See, e.g., Verlinden*, 461 U.S. at 486 (stating that foreign sovereign immunity "is a matter of grace and comity on the part of the United States"); *Arriba Ltd. v. Petroleos Mexicanos*, 962 F.2d 528, 537 (5th Cir. 1992) ("It is unimaginable that FSIA would authorize broader exposure to suit of a foreign government instrumentality . . . than that of domestic governmental units.").

to a scope of employment analysis, regardless of state law doctrines of respondeat superior and apparent authority."); *Craine v. United States*, 722 F.2d 1523, 1526 (11th Cir. 1984) ("absent a negligent act or omission on the part of a Government employee while in the scope of his employment, the United States cannot be held liable."); *Pierson v. United States*, 527 F.2d 459, 464 (9th Cir. 1975) (apparent authority insufficient to confer jurisdiction under the FTCA, which "imposes liability on the Government for the acts of its servants only when they are acting within the scope of their employment."); *Rodriguez v. United States*, 455 F.2d 940, 942 (1st Cir. 1972) (rejecting application of Puerto Rico permissive use statute to defeat U.S. government's immunity because "[t]hat the government employee who caused the particular injury was in the course of his employment is one of the basic requirements" of the FTCA); *Mider v. United States*, 322 F.2d 193, 196 (6th Cir. 1963) ("Under the Federal Tort Claims Act, the government would not be liable for personal injury or loss of property caused by the wrongful act of a member of the Armed Forces, while acting outside the scope of his authority, and in an unofficial capacity."). As the Sixth Circuit explained long ago:

> Reference must be had to the law of the state for the applicable law as to liability under that doctrine, but state law imposing liability regardless of whether the agent or servant was acting within the scope of his employment, or absolute liability under any circumstances, is inapplicable and irrelevant. The statute itself leaves little room for question on this issue, and any doubt that may have remained has been dispelled by decisions of the courts.

United States v. Taylor, 236 F.2d 649, 653 (6th Cir. 1956).[8]

In short, the district court and the Ninth Circuit's opinion that the "scope of employment" provision incorporates state liability rules – even when such rules are inconsistent with the federal jurisdictional requirement – violates section 1606 and conflicts in principle with *Laird*, *Dalehite*, and well-settled precedent under the FTCA.

c. The Ninth Circuit's reliance on Oregon's vicarious liability rule implicates unique concerns underlying the FSIA. *See, e.g., Suter v. Munich Reinsurance Co.*, 223 F.3d 150, 164 (3d Cir. 2000) (Alito, J., dissenting) (discussing the "unique policy concerns" that are "implicated by the FSIA"). One of the central purposes of the FSIA was to create a uniform body of law regarding immunity determinations involving foreign sovereigns. *See Verlinden*, 461 U.S. at 489 (quoting H.R. REP. NO. 94-1487, at 32) (recognizing "'the importance of developing a uniform body of law in this area'"); *Bancec*, 462 U.S. at 622 n.11 (FSIA intended to develop "a uniform body of law concerning the amenability of a foreign sovereign to suit in United States courts"); *id.* (quoting *Banco Nacional de Cuba v. Sabbatino*, 376

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[8] Adherence to the scope of employment language under the FTCA is notwithstanding *Williams v. United States*, 350 U.S. 857 (1955), where this Court held that the FTCA's "line of duty" requirement is "controlled by the California doctrine of respondeat superior." *Id.*; *see also* 28 U.S.C. 2671. The general rule *is* that courts apply the doctrine of respondeat superior; the problem arises only when that doctrine, or another state liability rule, expands beyond the scope of employment. The cases cited above make clear that the federal jurisdictional language controls in the event of a conflict with a state rule of liability.

U.S. 398, 425 (1964)) (stating that "matters bearing on the nation's foreign relations 'should not be left to divergent and perhaps parochial state interpretations.'"); *Republic of Austria v. Altmann*, 541 U.S. 677, 699 (2004) (stating that one of the FSIA's "principal purposes" is to "clarify[] the rules that judges should apply in resolving sovereign immunity claims").

d. The Ninth Circuit's unbridled incorporation of state liability rules – without regard to the requirements set forth by the FSIA's plain language – conflicts with the principle of uniformity underlying the FSIA. By using state substantive law without regard for the statutory "within the scope of employment" requirement, the Ninth Circuit's approach turns the federal jurisdictional statute into a mere pass-through for state liability rules untethered from the language chosen by Congress. Such a result undermines the uniformity that is at the heart of the FSIA and raises the specter of forum-shopping against foreign sovereigns.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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June 2009

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[Filed March 3, 2009]

No. 06-35563
D.C. No. CV-02-00430-MWM

JOHN V. DOE,
Plaintiff-Appellee,

v.

HOLY SEE,
Defendant-Appellant.

No. 06-35587
D.C. No. CV-02-00430-MWM

JOHN V. DOE,
Plaintiff-Appellant,

v.

HOLY SEE,
Defendant-Appellee.

OPINION

Appeal from the United States District Court
for the District of Oregon Michael W. Mosman,
District Judge, Presiding

Argued and Submitted
March 5, 2008—Portland, Oregon

Before: Ferdinand F. Fernandez and Marsha S. Berzon, Circuit Judges, and Otis D. Wright, II*, District Judge.

Per Curiam Opinion;
Dissent by Judge Berzon;
Concurrence by Judge Fernandez

COUNSEL

Jeffrey S. Lena, Law Office of Jeffrey S. Lena, Berkeley, California for the defendant-appellant-cross-appellee.

Marci A. Hamilton, Washington Crossing, Pennsylvania, for the plaintiff-appellee-cross-appellant.

OPINION

PER CURIAM:

We consider whether, on the allegations made in the Plaintiff's complaint in this case, the Holy See is entitled to immunity from suit under the Foreign

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* The Honorable Otis D. Wright, II, United States District Judge for the Central District of California, sitting by designation.

Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ 1330, 1602-1611.

John V. Doe brought suit in the United States District Court for the District of Oregon against the Holy See, the Archdiocese of Portland, Oregon ("Archdiocese"), the Catholic Bishop of Chicago ("Chicago Bishop"), and the Order of the Friar Servants ("Order"), alleging that when he was fifteen or sixteen years old he was sexually abused by Father Ronan, a priest in the Archdiocese and a member of the Order. Doe alleged various causes of action against the Holy See: (1) for vicarious liability based on the actions of the Holy See's instrumentalities, the Archdiocese, the Chicago Bishop, and the Order; (2) for respondeat superior liability based on the actions of the Holy See's employee, Ronan; and (3) for direct liability for the Holy See's own negligent retention and supervision of Ronan and its negligent failure to warn Doe of Ronan's dangerous proclivities. The Holy See contended in the district court that all of Doe's causes of action against it must be dismissed because, as a foreign sovereign, it is immune from suit in U.S. courts. The district court disagreed, holding that it has jurisdiction over all but one of Doe's claims under the FSIA's tortious act exception to sovereign immunity. The Holy See appeals.

For the reasons explained below, we affirm the district court in part and reverse in part as to the Holy See's appeal. As to the Holy See's vicarious liability for the acts of the Archdiocese, the Chicago Bishop, and the Order, we conclude that Doe has not alleged facts sufficient to overcome the presumption of separate juridical status for governmental instrumentalities, so the negligent acts of those entities cannot be

attributed to the Holy See for jurisdictional purposes. Doe's vicarious liability claims therefore cannot go forward as pleaded. As to the Holy See's respondeat superior liability for Ronan's acts, we conclude that, because Doe has sufficiently alleged that Ronan was an employee of the Holy See acting within the "scope of his employment" under Oregon law, Ronan's acts can be attributed to the Holy See for jurisdictional purposes. Further, we agree with the district court that Ronan's acts come within the FSIA's tortious act exception, so the Holy See is not immune from suit for the respondeat superior cause of action. Although the district court held that Doe's negligence claims against the Holy See could proceed under the FSIA's tortious act exception, we conclude that they cannot, because the FSIA preserves immunity for discretionary acts. However, we do not have jurisdiction to consider the cross-appeal as to the commercial activity exception at this time. The decision of the district court on the appeal by the Holy See is therefore affirmed in part, reversed in part, and remanded for further proceedings not inconsistent with this opinion. We dismiss the cross-appeal.

I. PROCEDURAL BACKGROUND

A. Complaint

In his amended complaint, filed April 1, 2004, Doe describes as follows Father Andrew Ronan's alleged sexual abuse of young boys: In 1955 or 1956, while employed as a parish priest in the Archdiocese of Armagh, Ireland, Father Ronan molested a minor and admitted to doing so. Ronan was later removed from Our Lady of Benburb and placed in the employ of the Chicago Bishop, at St. Philip's High School. At St.

Philip's, Ronan molested at least three male students. Confronted with allegations of abuse, Ronan admitted to molesting the boys. The Chicago Bishop, "acting in accordance with the policies, practices, and procedures" of the Holy See, did not discipline or remove Ronan from his post.[1]

In approximately 1965, when Doe was 15 or 16 years old, the Holy See and the Order of the Friar Servants, of which Ronan was a member, "placed" Ronan in a parish priest position at St. Albert's Church in Portland, Oregon. Doe met Ronan at St. Albert's and came to know Ronan "as his priest, counselor and spiritual adviser." Doe was a devout Roman Catholic, and for him "Ronan was a person of great influence and persuasion as a holy man and authority figure." Using his position of trust and authority, Ronan "engaged in harmful sexual contact upon" Doe on repeated occasions. The sexual contact occurred "in several places including the monastery and surrounding areas."

Based on these facts, Doe alleged causes of action against the Holy See, its "instrumentalities or agents" ("Does 1-10"), the Archdiocese, the Chicago Bishop, and the Order, all of whom it alleged were employers of Ronan. According to the amended complaint:

> Defendant Holy See is the ecclesiastical, governmental, and administrative capital of the Roman Catholic Church. Defendant Holy See is the composite of the authority, jurisdiction, and

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[1] These are, of course, only allegations, but we are required to take them as true for the purposes of this appeal. *See infra*, Part III.A.

sovereignty vested in the Pope and his delegated advisors to direct the world-wide Roman Catholic Church. Defendant Holy See has unqualified power over the Catholic Church including each and every individual and section of the [C]hurch. Defendant Holy See directs, supervises, supports, promotes[,] and engages in providing religious and pastoral guidance, education[,] and counseling services to Roman Catholics world-wide in exchange for all or a portion of the revenues derived from its members for these services. The Holy See engages in these activities through its agents, cardinals, bishops[,] and clergy, including religious order priests, brothers[,] and sisters, who engage in pastoral work under the authority of its bishop[s]. The Holy See is supported through the contributions of the faithful[,] which are received through donations from the dioceses around the world, including those in the United States. Defendant Holy See promotes and safeguards the morals and standards of conduct of the clergy of the [C]atholic [C]hurch. Defendant Holy See does this by and through its agents and instrumentalities, including the Congregation for the Clergy and the Congregation for Religious both delegated by the Pope and acting on his behalf. It creates, divides[,] and re-aligns dioceses, archdioceses[,] and ecclesiastical provinces. It also gives final approval to the creation, division[,] or suppression of provinces of religious orders. . . . It creates, appoints, assigns and re-assigns bishops [and] superiors of religious orders, and through the bishops and superiors of religious orders [it] has the power

> to directly assign and remove individual clergy. All bishops, clergy, and priests, including religious order priests, vow to show respect and obedience to the Pope and their bishop. Defendant Holy See also examines and is responsible for the work and discipline and all those things which concern bishops, superiors of religious orders, priests[,] and deacons of the religious clergy. In furtherance of this duty, Defendant Holy See requires bishops to file a report, on a regular basis, outlining the status of, and any problems with, clergy. Defendant Holy See promulgates and enforces the laws and regulations regarding the education, training[,] and standards of conduct and discipline for its members and those who serve in the governmental, administrative, judicial, educational[,] and pastoral workings of the Catholic [C]hurch world-wide. Defendant Holy See is also directly responsible for removing superiors of religious orders, bishops, archbishops[,] and cardinals from service and/or making them ineligible for positions of leadership in the various divisions and offices of the Catholic [C]hurch.

The Archdiocese, according to the amendment complaint, is a corporation incorporated under the laws of the state of Oregon and is therefore a citizen of that state. It "provided pastoral services to [Doe] and his immediate family through its parishes." The Chicago Bishop is incorporated under the laws of the state of Illinois and is a citizen of that state. Finally, the Order is "a citizen of the state of Illinois," but it operates worldwide. It is under the "ultimate authority of" the Holy See.

Doe alleged that the Archdiocese and the Order were vicariously liable for Ronan's abuse of Doe, and that the Chicago Bishop and the Order were negligent in failing to warn the Archdiocese and Doe of Ronan's propensities. Doe also alleged that the Holy See was vicariously liable for Ronan's abuse of Doe and for the negligent actions of the Archdiocese, the Order, and the Chicago Bishop, and that the Holy See was itself negligent in its retention and supervision of Ronan and in failing to warn of his propensities.

B. District Court Decision

The Holy See moved to dismiss the complaint in its entirety for lack of subject-matter jurisdiction, arguing that as a foreign sovereign, it is presumptively immune from suit under the FSIA, and that neither the "tortious act" exception to sovereign immunity, 28 U.S.C. § 1605(a)(5), nor the "commercial activity" exception to sovereign immunity, 28 U.S.C. § 1605(a)(2), applies. The district court held that the commercial activity exception does not apply to permit the exercise of jurisdiction over Doe's claims; the court did not view the Holy See's activities as commercial because "the true essence of the complaint . . . clearly sound[s] in tort." *Doe v. Holy See*, 434 F. Supp. 2d 925, 942 (D. Or. 2006). In contrast, the district court held that the tortious act exception does apply, permitting it to exercise jurisdiction over all Doe's claims except for the fraud claim. *Id.* at 957. The district court therefore granted the Holy See's motion to dismiss as to the fraud claim, but it denied the motion as to all of Doe's other claims.

The Holy See appeals the district court's decision that the tortious act exception applies. Doe

cross-appeals the district court's dismissal of his fraud claim, contending that the commercial activity exception permits federal court jurisdiction over that cause of action.

II. STATUTORY FRAMEWORK

For much of our nation's history, from at least 1812 until 1952, "the United States generally granted foreign sovereigns complete immunity from suit in the courts of this country." *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 486 (1983) (citing *The Schooner Exchange v. M'Faddon*, 7 Cranch 116, 3 L. Ed. 287 (1812)). In 1952, however, the State Department adopted a more "restrictive" theory of foreign sovereign immunity, under which sovereign "immunity is confined to suits involving the foreign sovereign's public acts." *Id.* at 487. Applying this restrictive approach, questions of foreign sovereign immunity arising in U.S. courts were decided on a case-by-case basis, often with the assistance of letters from the State Department containing "suggestions of immunity." *Id.*

In 1976, to "clarify the governing standards" and to insulate the issue of sovereign immunity from the impact of "case-by-case diplomatic pressures," Congress enacted the FSIA, 28 U.S.C. §§ 1330, 1602-1611. *Verlinden*, 461 U.S. at 488. The FSIA contains "a comprehensive set of legal standards governing claims of immunity in every civil action against a foreign state or its political subdivisions, agencies, or instrumentalities." *Id.* at 488. It is this set of legal standards with which we deal today.

[1] Under the FSIA, a foreign state is "immune from the jurisdiction of the courts of the United States and of the States" unless one of the statute's enumerated exceptions applies. 28 U.S.C. § 1604. A foreign state "includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state." *Id.* § 1603(a). An "agency or instrumentality of a foreign state" is defined in turn as any entity:

> (1) which is a separate legal person, corporate or otherwise, and
>
> (2) which is an organ of a foreign state or political subdivision thereof, . . . and
>
> (3) which is neither a citizen of a State of the United States . . . nor created under the laws of any third country.

Id. § 1603(b).

[2] Section 1605[2] contains "[g]eneral exceptions to the jurisdictional immunity of a foreign state," providing in relevant part that:

> (a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case —
>
> . . .

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[2] All statutory citations are to Title 28 of the United States Code unless otherwise indicated.

(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States;

. . .

(5) not otherwise encompassed in paragraph (2) above, in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment; except this paragraph shall not apply to —

> (A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused, or
>
> (B) any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights . . .

The statute further defines the elements of the commercial activity exception: A "'commercial activity' means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose." *Id.* § 1603(d). A "'commercial activity carried on in the United States by a foreign state' means commercial activity carried on by such state and having substantial contact with the United States." *Id.* § 1603(e).

The statute does not set out any substantive rules of liability, but instead provides that, "[a]s to any claim for relief with respect to which a foreign state is not entitled to immunity under" the statute, "the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances." *Id.* § 1606.

III. ANALYSIS

A. Standard for Motions to Dismiss Based on Foreign Sovereign Immunity

The Holy See has brought a facial attack on the subject matter jurisdiction of the district court under Rule 12(b)(1). We therefore "assume [plaintiff's] [factual] allegations to be true and draw all reasonable inferences in his favor." *Wolfe v. Strankman*, 392 F.3d 358, 362 (9th Cir. 2004); *see also McNatt v. Apfel*, 201 F.3d 1084, 1087 (9th Cir. 2000) (holding that we "favorably view[ ] the facts alleged to support jurisdiction"). We do not, however, accept the "truth of *legal* conclusions merely because they are cast in the

form of factual allegations." *Warren v. Fox Family Worldwide, Inc.*, 328 F.3d 1136, 1139 (9th Cir. 2003) (emphasis added; internal quotations omitted) (quoting *W. Mining Council v. Watt*, 643 F.2d 618, 624 (9th Cir. 1981)).

The Holy See suggests that when evaluating facial motions to dismiss based on foreign sovereign immunity, we must require a greater-than-usual level of detail in the pleadings, and may not construe factual allegations in favor of the plaintiff. Neither contention is correct. The cases on which the Holy See relies involve *fact-based* challenges to subject-matter jurisdiction. *See, e.g.*, *Robinson v. Gov't of Malaysia*, 269 F.3d 133, 137-38, 146 (2d Cir. 2001) (relying on testimony and affidavits from the parties in concluding that the "generic allegations" in the complaint were insufficient to establish subject matter jurisdiction under the FSIA). In such cases, "no presumptive truthfulness attaches to plaintiff's allegations, and the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of jurisdictional claims." *Roberts v. Corrothers*, 812 F.2d 1173, 1177 (9th Cir. 1987).

Here, in contrast, the Holy See is contending that on the face of the complaint, we lack subject matter jurisdiction; it has introduced no evidence contesting any of the allegations. With regard to such a challenge, a motion to dismiss for lack of jurisdiction under the FSIA is no different from any other motion to dismiss on the pleadings for lack of jurisdiction, and we apply the same standards in evaluating its merit. *See, e.g.*, *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). As the D.C. Circuit explained in *Rong v. Liaoning Province Gov't*, 452 F.3d 883, 888 (D.C.

Cir. 2006), in the foreign sovereign immunity context, "[i]f the defendant challenges only the legal sufficiency of the plaintiff's jurisdictional allegations, then the district court should take the plaintiff's factual allegations as true and determine whether they bring the case within any of the exceptions to immunity invoked by the plaintiff."

Moreover, we have never held that anything other than our usual notice pleading standard applies to complaints that allege an exception to foreign sovereign immunity. Under notice pleading rules, we require only "a short and plain statement" of the grounds for jurisdiction and the claim for relief. Fed. R. Civ. P. 8(a)(1), (2); *see also Bell Atlantic Corp. v. Twombley*, ___ U.S. ___, 127 S.Ct. 1955, 1964-65 (2007). We do not impose a heightened pleading standard in the absence of "an explicit requirement in a statute or federal rule," *Skaff v. Meridien North America Beverly Hills, LLC*, 506 F.3d 832, 841 (9th Cir. 2007); there is no such explicit requirement here applicable. In evaluating assertions of subject-matter jurisdiction based on an exception to foreign sovereign immunity, then, we apply the same notice pleading requirements we would apply to any other assertion of subject-matter jurisdiction and look only for a "short and plain statement" of the basis for jurisdiction.

B. Appellate Jurisdiction

1. Jurisdiction Over Appeal

A district court's denial of immunity to a foreign sovereign is an appealable order under the collateral order doctrine. *See Schoenberg v. Exportadora de Sal, S.A.*, 930 F.2d 777, 779 (9th Cir. 1991); *see also In re*

Republic of the Phil., 309 F.3d 1143, 1148 (9th Cir. 2002) (explaining that refusal to dismiss on grounds of sovereign immunity is within the collateral order doctrine because it "may result in the parties having to litigate claims over which the court lacks jurisdiction").

2. Jurisdiction over Cross-Appeal

Doe cross-appeals and argues that his claims come within the FSIA's commercial activity exception to sovereign immunity, § 1605(a)(2). The Holy See contends that we do not have jurisdiction over Doe's cross-appeal because it is not "inextricably intertwined" with the collaterally appealable issue of whether the Holy See is immune from suit. *See Burlington N. & Santa Fe Ry. Co. v. Vaughn*, 509 F.3d 1085, 1093-94 (9th Cir. 2007) (in a case involving a collaterally appealable order, denying a tribe sovereign immunity, but holding that the court could not reach other issues raised on appeal because they were not "inextricably intertwined" with the collaterally appealable issue). According to the Holy See, we do not have jurisdiction to consider Doe's argument that his claims come within the commercial activity exception. We agree.

[3] As a general rule, the collateral order doctrine permits appellate jurisdiction only over those decisions of a district court that "conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and [are] effectively unreviewable on appeal from a final judgment." *See In re Copley Press, Inc.*, 518 F.3d 1022, 1025 (9th Cir. 2008) (quoting *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978)). A decision denying immunity to a foreign sovereign meets those

requirements. *See Gupta v. Thai Airways Int'l, Ltd.*, 487 F.3d 759, 763-64 & n.6 (9th Cir. 2007). Additionally, permitting a trial to go forward against a foreign sovereign when there is a claim of sovereign immunity "imperil[s] a substantial public interest." *See Will v. Hallock*, 546 U.S. 345, 353 (2006) (explaining why decisions denying absolute, qualified, and Eleventh Amendment immunity come within the collaterally appealable order doctrine).

The collaterally appealable order doctrine does not automatically permit review of district court rulings contained in the same district court opinion as the appealable determination, if they do not themselves meet these requirements. *See Abney v. United States*, 431 U.S. 651, 663 (1977) (after concluding that the collateral order doctrine applies to a decision denying a motion to dismiss on double jeopardy grounds, holding that "other claims presented to, and rejected by, the district court in passing on the . . . motion to dismiss . . . are appealable if, and only if, they too fall within [the] collateral-order exception to the final-judgment rule"); *Burlington N.*, 509 F.3d at 1089, 1093-94 (refusing to exercise pendent appellate jurisdiction over an exhaustion issue decided in the same district court order as the collaterally appealable question); *United States v. Yellow Freight Sys., Inc.*, 637 F.2d 1248, 1251 (9th Cir. 1980) ("Inquiry into the immediate appealability of a particular pretrial order must focus upon each claim asserted."); *but cf. Joseph v. Office of Consulate Gen. of Nig.*, 830 F.2d 1018, 1021 (9th Cir. 1987) (assuming jurisdiction over cross-appeal in FSIA case, without explanation).

Here, the tort causes of action are not inextricably intertwined with Doe's other claims. Thus, that

concept is not sufficient to allow Doe to appeal the district court's grant of immunity as far as that exception is concerned.[3]

Nor do we agree that we ought to simply take up the commercial activity issue on the basis that it is no more than an alternate ground to uphold the district court. In fact, the need for review of immunity denials — avoiding the undermining of the purpose of the grant of immunity[4] — has no weight where immunity has been granted. Were there any doubt about that, the sensitive nature of the issues dealing with sovereigns would convince us that it would generally be prudentially unsound to expand review into the

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[3] We are aware of the fact that § 1605(a)(5), identifying the tortious act exception, is applicable to cases "not otherwise encompassed in paragraph (2) [the commercial activity exception] above." This language does not mean that, in interpreting the tortious act exception in (a)(5), we must always first consider whether the commercial activity exception in (a)(2) applies. Courts have not proceeded in that fashion. *See, e.g., Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 439-43 (1989); *Blaxland v. Commonwealth Dir. of Public Prosecutions*, 323 F.3d 1198, 1203-04 (9th Cir. 2003); *Risk v. Halvorsen*, 936 F.2d 393, 395-96 (9th Cir. 1991). Indeed, in *Joseph*, 830 F.2d at 1025, we explicitly stated that because we could decide the question presented under subsection (a)(5), there was no need to consider subsection (a)(2) at all. Other courts have reached the same result. *See, e.g., Robinson v. Gov't of Malay.*, 269 F.3d 133, 145-47 (2d Cir. 2001); *Cabiri v. Gov't of Republic of Ghana*, 165 F.3d 193, 199-201 (2d Cir. 1999); *Frolova v. Union of Soviet Socialist Republics*, 761 F.2d 370, 379 (7th Cir. 1985); *Asociacion de Reclamantes v. United Mexican States*, 735 F.2d 1517, 1524-25 (D.C. Cir. 1984); *Persinger v. Islamic Republic of Iran*, 729 F.2d 835, 838-39 (D.C. Cir. 1984).

[4] *See Gupta*, 487 F.3d at 763-64.

area of immunity grants when an appeal is taken from a denial of immunity.

[4] This case points up one of the perils of undertaking unnecessary review of grants of immunity. On this appeal we are presented with comparatively straightforward questions about the relationship between the Holy See and local priests under the tort exception. But the cross-appeal seeks to expand our inquiry into the arcane question of whether church functions are commercial activity because churches receive financial support from their parishioners, or otherwise. That is an issue that actually has nothing to do with the issues on interlocutory appeal.

[5] To say it another way, it is well established that, although an interlocutory appeal can be taken whenever immunity (absolute or qualified) is denied to a person or entity claiming entitlement thereto, an expansion to other issues is not usually allowed. *See Swint v. Chambers County Comm'n.*, 514 U.S. 35, 43-51 (1995); *Cunningham v. Gates*, 229 F.3d 1271, 1284-86 (9th Cir. 2000). We are asked to, in effect, change that rule so that whenever immunity is denied on one set of issues but granted on another set, a cross-appeal can be taken regarding the granted set. Surely that would be the ineluctable effect of Doe's request. One would not even need to show, by the way, a true interlocking of issues beyond the fact that both deal with immunity. One would only need to argue that the alternative set will support the denial of immunity on a wholly different basis. That approach would be followed even if the district court had expressly ruled to the contrary on the alternative set

of issues.[5] In other words, here we would be asked to take up the appeal from that grant and reverse the district court's determination; we would have to reach out and engage in a lengthy disquisition on the commercial activity exception to FSIA, which we neither must nor should do.

[6] Thus, we will not consider issues regarding the district court's grant of immunity under the commercial exception to the FSIA.

C. Determining Which Acts May Be Attributed to the Holy See for Jurisdictional Purposes

Before turning to the question of which, if any, of the FSIA's exceptions to immunity apply, we must determine which of the acts alleged in the complaint may legitimately be attributed to the Holy See for purposes of establishing jurisdiction. Doe's complaint alleges tortious acts by the Archdiocese, the Order, and

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[5] We are aware of the theory that allows alternate grounds to be used to support a district court decision, even where no cross-appeal has been filed. *See El Paso Natural Gas Co. v. Neztsosie*, 526 U.S. 473, 479-80 (1999); *Rivero v. City & County of San Francisco*, 316 F.3d 857, 861-62 (9th Cir. 2002). We have said that taking jurisdiction in that instance is prudential and discretionary. *See Lee v. Burlington N. Santa Fe Ry. Co.*, 245 F.3d 1102, 1107 (9th Cir. 2001); *Bryant v. Tech. Research Co.*, 654 F.2d 1337, 1341-42 (9th Cir. 1981). For reasons explained in the text, we would decline to exercise that jurisdiction. The theory makes a good deal of jurisprudential sense when both the grant and the denial of relief were actually appealable issues; it makes much less sense where, as here, a grant of immunity is not interlocutorily appealable at all and would involve, as we have said, a vast expansion of the issues in and complexity of the appeal.

the Bishop, all alleged to be corporations created by the Holy See. The Holy See argues that we may not consider these alleged acts by the Archdiocese, the Order, and the Bishop when determining whether jurisdiction exists over the Holy See, because Doe has not alleged facts that would overcome the presumption of separate juridical status such that the acts of the latter could be attributed to the former.[6] For the reasons explained below, given the allegations that Doe has pleaded, we agree with the Holy See. In addition, however, the complaint alleges a number of actions performed by the Holy See itself, such as "creat[ing]" dioceses and archdioceses, "giv[ing] final approval to the creation, division or suppression of provinces of religious orders," "employ[ing]" Ronan, and "plac[ing]" Ronan in the Archdiocese in Portland, Oregon. We conclude below that these acts do establish jurisdiction over the Holy See for the claims to which the acts are relevant.

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[6] We note that the question we address here is distinct from the question whether the Archdiocese, the Chicago Bishop, and the Order are themselves immune from suit under the FSIA. An "agency or instrumentality" of a foreign state, as defined by the FSIA, is immune from suit because it is itself a "foreign state" within the meaning of the Act. § 1603(a), (b). On the allegation of the complaint, however, the Archdiocese, the Chicago Bishop, and the Order are not "agencies or instrumentalities" of a foreign state within the meaning of the FSIA, because they are all citizens of the United States. *See* § 1603(b) (an agency or instrumentality of a foreign state means, among other things, an entity "which is neither a citizen of a State of the United States . . . nor created under the laws of any third country"). They are therefore not immune from suit.

1. Determining Whether an Agency Relationship Exists Between the Holy See and Its Domestic Corporations for Purposes of Establishing Jurisdiction over the Holy See

a. The Bancec *standard*

In arguing that the actions of the corporations are not attributable to Holy See for purposes of determining jurisdiction, the Holy See relies on *First Nat. City Bank v. Banco Para el Comercio Exterior de Cuba* ("*Bancec*"), 462 U.S. 611 (1983). In *Bancec*, the Supreme Court considered whether an instrumentality created by a foreign state could be held liable for the actions of the foreign state itself, a question the reverse of ours. Bancec was "the Cuban Government's exclusive agent in foreign trade," and the "government supplied all of [Bancec]'s capital and owned all of its stock." *Id.* at 614. Soon after Bancec sought to collect on a letter of credit that had been issued in its favor by Citibank, the Cuban government seized and nationalized all of Citibank's assets in Cuba. *Id.* So, when Bancec filed an action in U.S. federal court to recover on the letter of credit, Citibank counterclaimed, seeking a setoff for the value of its expropriated Cuban branches. *Id.* at 614-15. In the meantime, Bancec was dissolved, and Bancec filed a stipulation "stating that . . . its claim had been transferred to the Ministry of Foreign Trade" of Cuba. *Id.* at 615-16.

Jurisdiction in *Bancec* existed under FSIA's counterclaim provision, 28 U.S.C. § 1607(c).[7] Id. at 620-21. Because jurisdiction was not at issue, the question for the Supreme Court was one of liability: whether Bancec could be held liable for the act of expropriation committed by the Cuban government. *Id.* at 617.

[7] The Supreme Court began by noting that, although Bancec was an "agency or instrumentality" of Cuba within the meaning of FSIA § 1603(b), this status was relevant only to jurisdiction; it did not control the question of Bancec's liability for Cuba's actions. The FSIA "was not intended to affect the substantive law determining the liability of a foreign state or instrumentality." *Id.* at 620. Instead, liability was to be assessed according to corporate law principles "common to both international law and federal common law." *Id.* at 623. Surveying international and federal law on the status of corporations, the Supreme Court recognized a presumption of "separate juridical [status]" for the instrumentalities of foreign states. *Id.* at 624, 624-28.

[8] That presumption can be overcome, the Court explained, in two instances: when "a corporate entity is so extensively controlled by its owner that a relationship of principal and agent is created," or when recognizing the separate status of a corporation "would

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[7] "In any action brought by a foreign state [or its agency or instrumentality] . . . in a court of the United States or of a State, the foreign state shall not be accorded immunity with respect to any counterclaim . . . to the extent that the counterclaim does not seek relief exceeding in amount or differing in kind from that sought by the foreign state." 28 U.S.C. § 1607(c).

work fraud or injustice." *Id.* at 629. The Court then held the latter standard dispositive of Bancec's case: The Cuban government could not have sued in its own name in a U.S. court "without waiving its sovereign immunity and answering for [its] seizure of Citibank's assets." *Id.* at 633. Instead, Cuba had transferred its assets to separate entities, and Bancec then sought to avoid liability for the seizure. "[T]he Cuban government . . . [and] not any third parties that may have relied on Bancec's separate juridical identity" would be the real beneficiary if Bancec was not held liable for the Cuban government's actions. *Id.* at 631-32. Given this circumstance, the Court concluded that to "adhere blindly to the corporate form" would work such an "injustice" that the presumption of separate juridical status had been overcome. *Id.* at 632. Holding Bancec liable for the Cuban government's actions, the Court held that Citibank was entitled to offset the value of its seized assets from the amount it owed to Bancec. *Id.* at 634.

[9] The Supreme Court in *Bancec* did not have the opportunity to consider whether the actions of a *corporation* may be attributed to the *sovereign* — the reverse of the *Bancec* scenario — for purposes of determining whether jurisdiction over that sovereign exists. This Circuit has not previously addressed that question either.[8] At least two other circuits, however, faced with such a scenario, have applied *Bancec*'s

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[8] We have, however, applied the *Bancec* presumption of separate juridical status at the merits phase of FSIA litigation. *See Flatow v. Islamic Republic of Iran*, 308 F.3d 1065 (9th Cir. 2002) (applying *Bancec* in a case in which an individual who had obtained a judgment against Iran attempted to enforce it against the Bank Saderat Iran).

substantive corporate law principles in determining whether jurisdiction exists under the FSIA.

In *Transamerica Leasing v. La Republica de Venezuela*, 200 F.3d 843 (D.C. Cir. 2000), a plaintiff sued Venezuela, alleging that Venezuela was liable for the commercial acts of a government instrumentality, CAVN. *Id.* at 846. To determine whether Venezuela was amenable to suit under the commercial activity exception, the court turned to the *Bancec* test and asked whether (1) Venezuela and CAVN had a principal-agent relationship, or (2) recognizing CAVN as a separate entity would work an injustice. *Id.* at 848. Although it acknowledged that "*Bancec* recognized these as exceptions to the rule that a foreign sovereign is not *liable* for the acts of an instrumentality of the state," the D.C. Circuit held that "they serve also as exceptions to the rule that a foreign sovereign is not *amenable to suit* based on the acts of such an instrumentality." *Id.* (emphasis added). *See also Foremost-McKesson, Inc. v. Islamic Republic of Iran*, 905 F.2d 438, 446 (D.C. Cir. 1990) ("The presumption of juridical separateness of entities also applies to jurisdictional issues."). The Fifth Circuit adopted the same principle in *Arriba Ltd. v. Petroleos Mexicanos*, 962 F.2d 528, 533-36 (5th Cir. 1992), refusing to attribute the actions of a private labor union to the Mexican state-owned oil company for purposes of determining FSIA jurisdiction.

[10] We join the D.C. Circuit and the Fifth Circuit in extending *Bancec*'s analysis to the question whether the actions of a corporation may render a foreign sovereign amenable to suit. A foreign state can only "act[ ] through its agents," be they corporations or individual people. *Phaneuf v. Republic of Indonesia*,

106 F.3d 302, 307-08 (9th Cir. 1997) ("Because a foreign state acts through its agents, an agent's deed . . . constitutes activity 'of the foreign state.'"); *see also Gilson v. Republic of Ireland*, 682 F.2d 1022, 1026 n.16 (D.C. Cir. 1982) (noting that "the activities of an agent may be attributed to the principal for jurisdictional purposes"). Therefore, in applying the jurisdictional provisions of the FSIA, courts will routinely have to decide whether a particular individual or corporation is an agent of a foreign state.

[11] *Bancec* provides a workable standard for deciding this question. Applying *Bancec*'s presumption in favor of separate juridical status for foreign state instrumentalities at the jurisdiction phase, not just at the liability phase, is consistent with the FSIA's broad policy goals. In *Bancec*, the Court discussed at length the comity considerations at play when entertaining suits against foreign government instrumentalities in U.S. courts. 462 U.S. at 626; *see also Republic of Austria v. Altmann*, 541 U.S. 677, 688 (2004). As at the merits phase, failing to recognize the presumption of separate juridical status at the jurisdictional phase could "result in substantial uncertainty over whether an instrumentality's assets would be diverted to satisfy a claim against the sovereign," and might frustrate "the efforts of sovereign nations to structure their governmental activities in a manner deemed necessary to promote economic development and efficient administration." *Bancec*, 462 U.S. at 626. Applying *Bancec*'s presumption — as well as the standard for overcoming that presumption — at the outset of a suit as well as at the merits phase makes good sense.

With these considerations in mind, we conclude that it is appropriate to use the *Bancec* standard to determine whether Doe's allegations are sufficient to permit jurisdiction over the Holy See based on acts committed by its affiliated domestic corporations.

b. Applying the Bancec *standard to Doe's complaint*

[12] Applying the rule of *Bancec* to the allegations in Doe's complaint, we conclude that Doe has not alleged sufficient facts to overcome the "presumption of separate juridical status," for reasons similar to those dispositive in the converse situation in *Flatow v. Islamic Republic of Iran*, 308 F.3d 1065 (9th Cir. 2002). In *Flatow*, we applied *Bancec* to the relationship between the Iranian government and the Bank Saderat Iran ("BSI"). BSI was created by the Iranian government and fully owned by it. *Id.* at 1072-73. Its actions were regulated by Iran's General Assembly of Banks and High Council of Banks, which reviewed BSI's annual statements and "perform[ed] broad policymaking functions." *Id.* at 1073. *Flatow* held these facts insufficient to overcome the presumption of separate juridical status, because the government's "involvement [did not] rise to a [sufficiently] high[ ] level," and in particular, did not involve "day-to-day" control. *Id.* (citing *McKesson Corp v. Islamic Republic of Iran*, 52 F.3d 346, 351-52 (D.C. Cir. 1995) (holding the presumption of separateness overcome where Iran controlled routine business decisions, such as declaring and paying dividends and honoring contracts).

Doe's complaint does not allege day-to-day, routine involvement of the Holy See in the affairs of the Archdiocese, the Order, and the Bishop. Instead, it

alleges that the Holy See "creates, divides[,] and re-aligns dioceses, archdioceses and ecclesiastical provinces" and "gives final approval to the creation, division or suppression of provinces of religious orders." Doe also alleges that the Holy See "promulgates and enforces the laws and regulations regarding the education, training[,] and standards of conduct and discipline for its members and those who serve in the governmental, administrative, judicial, educational[,] and pastoral workings of the Catholic [C]hurch world-wide." These factual allegations — that the Holy See participated in creating the corporations and continues to promulgate laws and regulations that apply to them — are quite similar to the facts in *Flatow*, and are, as in *Flatow*, insufficient to overcome the presumption of separate juridical status.

Doe does directly allege in his complaint that the corporations are "agents" of the Holy See. In this context, however, the term "agent" is not self-explanatory. "Agent" can have more than one legal meaning: the standard for determining that a natural person is the agent of another differs from the standard for attribution of the actions of a corporation to another entity. *See, e.g.*, *Rough & Ready Lumber Co. v. Blue Sky Forest Products*, 105 Or. App. 227, 231 (1991) (an agency relationship between two natural persons "results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act.") (quoting Restatement (Second) of Agency § 1 (1958)). The *Bancec* standard is in fact most similar to the "alter ego" or "piercing the corporate veil" standards applied in many state courts to determine whether the actions of a corporation are attributable to its owners. *See, e.g.*, *Amfac Foods, Inc.*

v. Int'l Sys. & Controls Corp., 294 Or. 94, 107-08 (1982) (holding that to demonstrate alter ego status, plaintiff must show control of the subsidiary and that "the plaintiff's inability to collect from the corporation resulted from some form of improper conduct" on part of parent corporation). Even reading the complaint generously to Doe, as we must, we cannot infer from the use of the word "agent" that Doe is alleging the type of day-to-day control that *Bancec* and *Flatow* require to overcome the presumption of separate juridical status.

The district court apparently found jurisdiction proper by relying on the second, equitable prong of *Bancec*, noting that "foreign states cannot avoid their obligations to third parties by engaging in abuses of the corporate form." *Doe*, 434 F. Supp. 2d at 936. But Doe has not alleged that the Holy See has inappropriately used the separate status of the corporations to its own benefit, as in *Bancec*, or that the Holy See created the corporations for the purpose of evading liability for its own wrongs. Rather, in ruling for Doe on this point, the district court seemed to be influenced by the complaint's allegations of wrongful acts perpetrated directly by the Holy See. *See Doe*, 434 F. Supp. 2d at 937. The existence of such *direct* wrongful acts cannot determine whether the distinct wrongful acts of the affiliated *corporations* should also be attributed to the Holy See.

[13] Doe's vicarious liability claim for the actions of the Archdiocese, Chicago Bishop, and Order is based entirely on an allegation that the actions of the domestic corporations are attributable to the Holy See. Doe has therefore not alleged sufficient facts to demonstrate that any exception to sovereign immunity

applies to that cause of action. We therefore conclude that the district court lacked jurisdiction over the Holy See for the tortious acts allegedly committed by the Archdiocese, the Chicago Bishop, and the Order.

2. Actions Performed by the Holy See Itself

As to Doe's other causes of action, the Holy See contends that Doe has failed to allege any facts in support of his claims based on the actions of the Holy See itself, rather than of its domestic corporations. We do not agree. Doe has made several allegations regarding actions taken by the Holy See itself — namely, its negligent retention and supervision of Ronan and its failure to warn Doe of Ronan's dangerousness. Doe has also alleged respondeat superior liability against the Holy See for Ronan's actions as an alleged employee of the Holy See. We turn now to those allegations, considering whether they are sufficient to support jurisdiction over the Holy See.

We will now examine whether the district court could exercise jurisdiction over the Holy See for these causes of action under the FSIA's tortious act exception.

D. Tortious Act Exception

The district court held that all of Doe's claims, except the one for fraud, come within the exception to immunity for a "tortious act or omission of [a] foreign state or of any official or employee of that foreign state while acting within the scope of his or her employment." § 1605(a)(2); *Doe*, 434 F. Supp. 2d at 950. We agree in part.

Doe's respondeat superior claim based on Ronan's actions comes within the tortious act exception. Doe has clearly alleged that Ronan was an employee of the Holy See, acting within the scope of his employment, when he molested Doe. We conclude, however, that Doe's claims against the Holy See for negligent retention and supervision and failure to warn cannot be brought under the tort exception because they are barred by the FSIA's exclusion for discretionary functions, § 1605(a)(5)(A).

1. Respondeat superior for Father Ronan's tortious acts

a. The meaning of "employee"

In his complaint, Doe alleges that the Holy See "employed priests, including one Father Andrew Ronan" and that Ronan was under the "direct supervision and control" of the Holy See. The Holy See was further "responsible for the work and discipline [of] . . . priests." According to the complaint, the Holy See on at least one occasion was responsible for controlling where Ronan performed his functions: the Holy See "placed Ronan in [the] Archdiocese at St. Albert's Church in Portland, Oregon."

The Holy See maintains that Doe has not alleged sufficient facts to demonstrate that Ronan was an "employee" of the Holy See for purposes of the tortious act exception, because the word "employee" is a legal conclusion we are not required to accept as true. We are highly skeptical of the notion that, under notice pleading, use of the word "employee" in a complaint is insufficient to establish an allegation of an employment relationship. True, in addition to being a

word used in everyday speech, "employee" does have a common law legal definition. *See, e.g.*, *Schaff v. Ray's Land & Sea Food Co.*, 45 P.3d 936, 939 (Or. 2002) (defining "employee" for purposes of Oregon law). But then, of course, so do the words "person," "corporation," "citizen," and "molest," also used in this complaint — and, undoubtedly, in many other complaints filed each year in federal courts — without further definition. Were we to require that every such word used in a complaint be broken down into its constituent factual predicates, we would undermine the purpose of notice pleading — that is, "to focus litigation on the merits of a claim" rather than on procedural requirements. *Galbraith v. County of Santa Clara*, 307 F.3d 1119, 1125 (9th Cir. 2002). Thus, while we do not accept Doe's legal conclusions as true, we also do not engage in "a hypertechnical reading of the complaint inconsistent with the generous notice pleading standard." *Mendoza v. Zirkle Fruit Co.*, 301 F.3d 1163, 1168 (9th Cir. 2002). Although there is undoubtedly a line beyond which the legal definition of a commonly used term is so complex or contentious that failure to allege each element of the definition would prevent a defendant from understanding the factual basis for the claim, use of the word "employee" falls well short of that line.

b. The meaning of "within the scope of employment"

More complicated under Oregon law is the question of whether Ronan's actions were "within the scope of employment" as the FSIA requires. In *Joseph*, we indicated that the "'scope of employment' provision of the tortious activity exception essentially requires a finding that the doctrine of respondeat superior

applies to the tortious acts of individuals." 830 F.2d at 1025. "This determination is governed by state law." *Id.; see also Randolph*, 97 F.3d at 327.

As it happens, the Oregon Supreme Court has directly addressed whether a church can be liable under respondeat superior for the actions of a priest who sexually assaults a parishioner. In *Fearing v. Bucher*, 977 P.2d 1163 (Or. 1999), the plaintiff alleged that he had been sexually molested by a Catholic priest who "used his position as youth pastor, spiritual guide, confessor, and priest to plaintiff and his family to gain their trust and confidence" and "[b]y virtue of that relationship . . . gained the opportunity to be alone with plaintiff" and sexually assault him. *Id.* at 1166. *Fearing* began its analysis from the proposition that, in a respondeat superior action, an employer can be liable for intentional as well as unintentional torts of an employee if committed "within the scope of employment." *Id.* Generally, under Oregon law, "three requirements must be met to demonstrate that an employee was acting within the course and scope of employment":

> (1) the act must have occurred substantially within the time and space limits authorized by the employment;
>
> (2) the employee must have been motivated, at least partially, by a purpose to serve the employer; and
>
> (3) the act must have been of a kind which the employee was hired to perform.

Id. at 1166.

Applying these three factors, *Fearing* stated that the priest's "alleged sexual assaults on plaintiff clearly were outside the scope of his employment" under the traditional test, but held that the "inquiry does not end there." *Id.* at 1166. Instead, the court went on to ask whether "acts that *were* within [the priest's] scope of employment resulted in the acts which led to injury to [the] plaintiff." *Id.* (emphasis added; internal quotation marks and citation omitted). The court concluded that because a jury could infer from the facts alleged that "performance of . . . pastoral duties with respect to plaintiff and his family were a necessary precursor to the sexual abuse and that the assaults thus were a direct outgrowth of and were engendered by conduct that was within the scope of . . . employment," *id.* at 1168, the complaint satisfied "all three . . . requirements for establishing that employee conduct was within the scope of employment." *Id.* at 1167.

[14] The Oregon Supreme Court has since clarified that *Fearing* created a "scope of employment" test specifically applicable to intentional torts. *Minnis v. Oregon Mut. Ins. Co.*, 48 P.3d 137 (Or. 2002), observed that, in *Fearing*, there was no question that the first requirement of "the within the scope of employment" test was met, because the abuse occurred "within the time and space limits" of the priest's employment. 48 P.3d at 144-45. But because *Fearing* involved an intentional tort, it was inappropriate to focus on whether the tort itself was committed in furtherance of the employer's objectives or was an act of the kind the employee was hired to perform:

> Rather, for the purpose of determining whether a complaint meets the second and third . . . requirements . . . , the focus properly is directed

> at whether the complaint contains sufficient allegations of employee's conduct that was within the scope of his employment, that is, conduct that the employee was hired to perform, that arguably resulted in the acts that caused plaintiff's injury.

Id. at 144-45 (internal quotation marks, alterations, and citations omitted). *Minnis* thus makes clear that, rather than holding that sexual abuse is not within the scope of employment, *Fearing* created an alternative test with respect to the second and third factors of the "within the scope of employment" standard, applicable when a plaintiff has alleged an intentional tort: An intentional tort is within the scope of employment, and can support respondeat superior liability for the employer, if conduct that was within the scope of employment was "a necessary precursor to the" intentional tort and the intentional tort was "a direct outgrowth of . . . conduct that was within the scope of . . . employment." *Fearing*, 977 P.2d at 1163.

[15] Doe's allegations meet this standard. Doe has asserted that he "came to know Ronan as his priest, counselor and spiritual adviser," and that Ronan used his "position of authority" to "engage in harmful sexual contact upon" Doe in "several places including the monastery and surrounding areas in Portland, Oregon." His allegations are thus very similar to those in *Fearing*. 977 P.2d at 1166.

[16] Under Oregon law, then, Doe has clearly alleged sufficient facts to show that his claim is based on an injury caused by an "employee" of the foreign state while acting "within the scope of his . . . employment," as required to come within the FSIA's

tortious act exception. § 1605(a)(5). The Holy See is therefore not immune from Doe's respondeat superior claim.[9]

2. *Negligent retention, supervision, and failure to warn*

According to Doe's complaint, the Holy See "negligently retained Ronan and failed to warn those coming into contact with him," even though it knew or should have known that Ronan had a history of sexually abusing children. The Holy See also "failed to provide reasonable supervision of Ronan." Whether or not this alleged negligence otherwise comes within the language of the FSIA's tortious act exception — a question we do not decide — these causes of action may not go forward under that section because they are barred by the exclusion for "discretionary functions." The district court thus erred in exercising jurisdiction over these claims.

[17] The discretionary function exclusion shields foreign sovereigns from tort claims "based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused." § 1605(5)(A). The language of the discretionary function exclusion closely parallels the language of a similar exclusion in the Federal Tort Claims Act ("FTCA"), so we look to case law on the FTCA when interpreting the FSIA's discretionary

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[9] We are aware of the fact that the Sixth Circuit has reached a different result, but the law of Kentucky, which it was construing, differs from the law of Oregon. *See O'Bryan v. Holy See*, Nos. 07-5078, 07-5163, ___ F.3d ___, ___, 2009 WL 305342, at *14 (6th Cir. Feb. 10, 2009).

function exclusion. *See* 28 U.S.C. § 2680(a); *Joseph*, 830 F.2d at 1026. Extrapolating from FTCA case law, the Holy See is protected by the discretionary function exclusion if the challenged action meets two criteria: (1) it is "discretionary in nature" or "involve[s] an element of judgment or choice" and (2) "the judgment is of the kind that the discretionary function exception was designed to shield." *United States v. Gaubert*, 499 U.S. 315, 322 (1991) (internal quotation marks and citation omitted); *see also Soldano v. United States*, 453 F.3d 1140, 1145 (9th Cir. 2006) (clarifying that judgments "of the kind that the discretionary function exception was designed to shield" are "governmental actions and decisions based on considerations of public policy.") (internal quotation marks and citations omitted).

[18] As to the first *Gaubert* criterion, Doe refers vaguely in his complaint to the Holy See's "policies, practices, and procedures" of not firing priests for, and not warning others about, their abusive acts. He also refers in his brief to a "policy promulgated by the Holy See to cover up incidents of child abuse," which he argues removed "an[y] element of judgment or choice" from the Holy See's actions "to the extent that Appellants were acting pursuant to" it. Yet nowhere does Doe allege the existence of a policy that is "*specific* and *mandatory*" on the Holy See. *Kennewick Irrigation Dist. v. United States*, 880 F.2d 1018, 1026 (9th Cir. 1989) (emphasis in original). He does not state the terms of this alleged policy, or describe any documents, promulgations, or orders embodying it. Nor does the complaint in any other way allege that the Holy See's decisions to retain Doe and not warn about his proclivities involved no element of judgment, choice, or discretion. While the burden of proving the

Gaubert factors ultimately falls on the sovereign entity asserting the discretionary function exception, "a plaintiff must advance a claim that is facially outside the discretionary function exception in order to survive a motion to dismiss." *Prescott v. United States*, 973 F.2d 696, 702 & n.4 (9th Cir. 1992) (citing *Carlyle v. U.S. Dep't of the Army*, 674 F.2d 554, 556 (6th Cir. 1982) ("Only after a plaintiff has successfully invoked jurisdiction by a pleading that facially alleges matters not excepted by [the FTCA] does the burden fall on the government to prove the applicability of a specific provision of [the FTCA].")). Doe has not pled any actions that fall facially outside the discretionary function exception.

[19] As to the second *Gaubert* criterion, the decision of whether and how to retain and supervise an employee, as well as whether to warn about his dangerous proclivities, are the type of discretionary judgments that the exclusion was designed to protect. We have held the hiring, supervision, and training of employees to be discretionary acts. *See Nurse v. United States*, 226 F.3d 996, 1001 (9th Cir. 2000) (holding that plaintiff's claims of "negligent and reckless employment, supervision and training of" employees "fall squarely within the discretionary function exception"); *see also Burkhart v. Washington Metro. Area Transit Auth.*, 112 F.3d 1207, 1217 (D.C. Cir. 1997) (holding that "decisions concerning the hiring, training, and super[vision]" of employees are discretionary). Moreover, failure to warn about an individual's dangerousness is discretionary.[10] *See*

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[10] Even were it not the case that the "failure to warn" claim is barred by the discretionary function exclusion, it would be barred

Sigman v. United States, 217 F.3d 785, 797 (9th Cir. 2000) (failure to warn individuals on Air Force Base about potentially dangerous serviceman was a discretionary function, because it "brought into play sensitive and competing policy considerations of protecting safety while preserving resources and preventing unwarranted alarm"); *Weissich v. United States*, 4 F.3d 810, 814-15 (9th Cir. 1993) (failure of probation officers to warn a prosecutor that probationer was a threat to him was a discretionary decision).

[20] The Holy See's failure to present any evidence that its actions were actually based on policy considerations is not relevant to whether the discretionary function exception applies. A foreign state's decision "need not *actually* be grounded in policy considerations so long as it is, by its nature[,] *susceptible* to a policy analysis." *See Kelly v. United States*, 241 F.3d 755, 764 n.5 (9th Cir. 2001) (second emphasis added). A policy analysis is one that

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by the "misrepresentation" exclusion. Like the discretionary function exclusion, the misrepresentation exclusion in the FSIA, § 1605(a)(5)(B), has been interpreted in light of the misrepresentation exclusion in the FTCA, § 2680(h). *See de Sanchez v. Banco Central de Nicaragua*, 770 F.2d 1385, 1398 (5th Cir. 1985). The misrepresentation exclusion covers both acts of affirmative misrepresentation and failure to warn. *See City and County of San Francisco v. United States*, 615 F.2d 498, 505 (9th Cir. 1980) (holding that "a negligent failure to inform, without more, is misrepresentation within the meaning of" the misrepresentation exclusion). In particular, we have held that government officials' failure to warn about an individual's dangerousness, which ultimately led to sexual abuse of a minor, comes within the misrepresentation exclusion. *See Lawrence v. United States*, 340 F.3d 952, 958 (9th Cir. 2003).

implements "political, social, and economic judgments." *Berkovitz v. United States*, 486 U.S. 531, 539 (1988) (internal quotation marks and citations omitted). In the case of Father Ronan's alleged abuse, the Holy See might have decided to retain him and not to warn his parishioners because it felt that to do otherwise would have harmed the Church's reputation locally, or because it felt that pastoral stability was sufficiently important for the parishioners' well-being, or because low ordination rates or staffing shortages made it necessary to keep Ronan on. That such social, economic, or political policy considerations could have influenced the decision renders it the kind of judgment that the discretionary function exception was designed to shield.

[21] In sum, the tortious act exception does not provide jurisdiction over Doe's negligent hiring, supervision, and failure to warn claims because they are barred by the discretionary function exclusion.[11] We therefore cannot affirm the district court's judgment on this ground.

IV. CONCLUSION

In conclusion, we observe once again that the Holy See has brought a facial attack on the allegations of

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[11] Because we conclude that the tortious act exception does not apply to the above claims, we have no occasion to consider whether the *entire* tort must occur in the United States, as the Sixth and D.C. Circuits have held. *See O'Bryan v. Holy See*, Nos. 07-5078, 07-5163, ___ F.3d ___, ___, 2009 WL 305342, at *13 (6th Cir. Feb. 10, 2009); *Asociacion de Reclamantes v. United Mexican States*, 735 F.2d 1517, 1524-25 (D.C. Cir. 1984). *But see Olsen v. Gov't of Mexico*, 729 F.2d 641, 646 (9th Cir. 1984).

subject-matter jurisdiction in the complaint. It remains to be seen whether Doe can prove his allegations. While the Holy See was certainly entitled to bring a facial attack on the complaint, such an approach is not without risk, for it "call[s] upon [us] to decide far-reaching . . . questions" of some importance "on a nonexistent factual record, even where . . . discovery" might "reveal the plaintiff's claims to be factually baseless." *Kwai Fun Wong v. United States*, 373 F.3d 952, 957 (9th Cir. 2004). After careful consideration, we have reached the conclusion that most of Doe's causes of action are not covered by the tort exception and overturn the district court's denial of immunity as to those. However, because it would be improper to consider the commercial activity exception, we express no opinion regarding that exception.

For the foregoing reasons, in appeal No. 06-35563 the decision of the district court is **AFFIRMED** in part, **REVERSED** in part, and **REMANDED**. The cross-appeal (No. 06-35587) is **DISMISSED**. Each party shall bear their own costs.

BERZON, Circuit Judge, dissenting in part:

I agree with the majority that Doe's negligence claims against the Holy See, as currently pleaded, cannot proceed under the tortious act exception to the Foreign Sovereign Immunities Act ("FSIA"). Unlike the majority, however, I would affirm the district court's holding that the FSIA does not give the Holy See immunity from Doe's claims of negligent retention, supervision, and failure to warn. As explained below,

we have jurisdiction to affirm the district court on any grounds that were raised below and supported by the record, and our case law compels the conclusion that Doe's negligence claims come within the FSIA's commercial activity exception.

I. Jurisdiction

We have before us an appeal (by the Holy See) and a crossappeal (by Doe), both seeking reversal of different aspects of the district court's decision. The Holy See's appeal, which is authorized under the collateral order doctrine, challenges the district court's ruling that the FSIA does not provide it with immunity from Doe's negligence claims. The district court held that although the commercial activity exception does not apply to defeat the Holy See's assertion of immunity, the tortious act exception does apply, permitting all Doe's claims except for the fraud claim to go forward. *See Doe v. Holy See*, 434 F. Supp. 2d 925, 957 (D. Or. 2006). The Holy See asks us to reverse the district court's immunity ruling, arguing that the tortious act exception is not applicable to Doe's negligence claims.

Doe argues, in response, that we should affirm the district court's ruling that the FSIA does not give the Holy See immunity from his negligence claims — either because the district court correctly held that the tortious act exception applies, or, in the alternative, because the commercial activity exception applies. In addition, Doe filed a cross-appeal, urging us to reverse the district court's dismissal of his fraud claim, because the commercial activity exception preserves federal subject matter jurisdiction over that claim. His argument concerning his cross-appeal and his response

to the Holy See's appeal of the district court's ruling as to his negligence claims are presented to us in a single brief, but they are clearly separable.

I agree with the majority and the Holy See that we lack jurisdiction over Doe's *actual* cross-appeal — that is, over the question whether the Holy See is immune from Doe's fraud cause of action. We do, however, have jurisdiction over Doe's arguments in favor of *upholding* the district court's order, including his argument that the non-fraud causes of action, which the district court allowed to go forward, are within the commercial activity exception.

Specifically, I agree that the district court's grant of immunity with regard to the fraud cause of action is not independently appealable under the collateral order doctrine at this stage in the proceedings. As the majority notes, where a district court has *granted* sovereign immunity on a particular claim, as opposed to where it has *denied* immunity and let the claim go forward, the concerns for foreign sovereigns that animate the collateral order doctrine do not apply. *See* Maj. Op. at 2559 (quoting *Will v. Hallock*, 546 U.S. 345, 353 (2006)). Further, the district court's grant of immunity and denial of jurisdiction over Doe's fraud cause of action will be reviewable at the end of the entire action, so there is no need to allow review of that decision at this time, before there has been a final judgment on the case as a whole. *See In re Copley Press, Inc.*, 518 F.3d 1022, 1025-26 (9th Cir. 2008).

Nor may we exercise pendent jurisdiction over Doe's fraud cause of action in the course of deciding the Holy See's appeal. To establish jurisdiction over an entity covered by the FSIA, each *individual* claim

contained in the complaint must come within an exception to foreign sovereign immunity. *See Joseph v. Office of the Consulate Gen. of Nigeria*, 830 F.2d 1018, 1023-25 (9th Cir. 1987) (analyzing separately whether each of plaintiff's claims came within an exception to foreign sovereign immunity). Therefore, a holding that Doe's respondeat superior or negligence claims come within one of the FSIA's exceptions does not necessarily decide the question whether the fraud claim does so as well. So the fraud cause of action cannot be viewed as "inextricably intertwined" with Doe's other claims, which would permit us to exercise pendent jurisdiction over it. *Burlington N. & Santa Fe Ry. Co. v. Vaughn*, 509 F.3d 1085, 1093-94 (9th Cir. 2007).

Our consideration of the fraud claim is also not "'necessary to ensure meaningful review of'" the other questions that are properly before us. *Meredith v. Oregon*, 321 F.3d 807, 812 (9th Cir. 2003) (quoting *Swint v. Chambers County Comm'n*, 514 U.S. 35, 51 (1995)). We have held that decision of an issue is "necessary to ensure meaningful review of" another question only if the assertedly pendent issue provided the basis for the district court's jurisdiction to reach the otherwise appealable question. *Id.* (internal quotation marks omitted) (holding that review of *Younger* abstention decision was necessary to ensure meaningful review of the district court's grant of a preliminary injunction, because in the absence of its *Younger* holding, the district court would not have had jurisdiction to issue the injunction). The denial of the fraud claim in this case, in contrast, was not an essential precursor to the district court's determination that it had jurisdiction over Doe's other causes of action. For these reasons, I agree with the

majority that the district court's dismissal of Doe's fraud claim is not properly before us.

At the same time, I entirely disagree with the majority's insistence that we lack jurisdiction to decide in full the question that the Holy See *has* appealed to us: whether the district court erred in denying immunity and exercising jurisdiction over all Doe's non-fraud causes of action. Doe argues in response that the district court's ruling should stand, because either the tortious act exception or the commercial activity exception applies and precludes immunity from suit.

As we have stated over and over again, we may affirm the district court on any ground raised below and supported by the record. *See, e.g.*, *Atel Fin. Corp. v. Quaker Coal Co.*, 321 F.3d 924, 926 (9th Cir. 2003) (per curiam) ("We may affirm a district court's judgment on any ground supported by the record, whether or not the decision of the district court relied on the same grounds or reasoning we adopt."); *accord Cigna Prop. & Cas. Ins. Co. v. Polaris Pictures Corp.*, 159 F.3d 412, 418-19 (9th Cir. 1998); *Jackson v. S. Cal. Gas Co.*, 881 F.2d 638, 643 (9th Cir. 1989).

No cross-appeal is required — or appropriate — where we are being asked only to affirm the district court's judgment in full, albeit on a ground rejected by the district court. We have long held that an appellee is required to file a cross-appeal if he seeks "to support modification of the judgment." *Engleson v. Burlington N. R.R. Co.*, 972 F.2d 1038, 1041 (9th Cir. 1992) (internal quotation marks and citation omitted). In contrast, "arguments that support the judgment as entered can be made without a cross-appeal . . . even

where the argument being raised has been explicitly rejected by the district court." *Id.* (internal quotation marks and citation omitted); *accord Gillam v. Nev. Power Co.*, 488 F.3d 1189, 1192 n.3 (9th Cir. 2007) (citing *Engleson*, and holding that an appellee did not need to cross-appeal to argue for a different standard of review than that used by the district court as an alternative ground for affirming the district court's judgment). In other words, "[s]o long as the appellee does not seek to 'enlarge' the rights it obtained under the district court judgment, or to 'lessen' the rights the appellant obtained under that judgment, appellee need not cross-appeal in order to present arguments supporting the judgment." *Rivero v. City & County of San Francisco*, 316 F.3d 857, 862 (9th Cir. 2002); *see also Lee v. Burlington N. Santa Fe Ry. Co.*, 245 F.3d 1102, 1107 (9th Cir. 2001) ("A prevailing party need not cross-petition to defend a judgment on any ground properly raised below, so long as that party seeks to preserve, and not to change, the judgment.").

So, if we conclude that the tortious act exception is insufficient to support jurisdiction over any of Doe's non-fraud claims, we may look to the commercial activity exception as an alternative ground on which to affirm the district court. Contrary to the majority's assertion, by doing so we would not be exercising jurisdiction over Doe's cross-appeal, in which Doe raises a commercial activity exception argument that would permit the exercise of jurisdiction over his fraud claim. Rather, we would be determining whether the record supports *affirmance* of the district court's order as to Doe's non-fraud claims, which is the subject of the Holy See's appeal. Put another way, Doe's cross-appeal asks us to "'enlarge' the rights [he] obtained under the district court judgment," *Rivero*,

316 F.3d at 862, so the majority is quite right that we may not consider his arguments regarding the fraud claim. But Doe needed no cross-appeal to respond to the Holy See's appeal; Doe could — and did — respond by asking us simply to preserve the result that the district court reached, either by following the district court's reasoning or by a different rationale. Our case law clearly permits us to do so.

The majority concludes otherwise, maintaining that deciding the commercial activity issues involves review of a *grant* of immunity. *See* Maj. Op. at 2560-61, 2562 & n.5. But that is simply not so. The district court did decide that the commercial activity exception does not apply, but — except for the fraud cause of action — it did not grant immunity on that basis, as it concluded that there was another basis for denying immunity. So the majority is just wrong when it states, repeatedly, that our reaching the commercial activity exception would entail reviewing a *grant* of immunity.

Moreover, I see no prudential reasons whatever for refusing to exercise our jurisdiction. The application of the commercial activity exception was fully litigated below, the district court decided the question, and the issue has been fully briefed and argued here. *See McClure v. Life Ins. Co. of N. Am.*, 84 F.3d 1129, 1133 (9th Cir. 1996) (holding that we can decline on appeal to affirm a summary judgment on grounds not relied on by the district court if the record is inadequate or the grounds not purely legal); *Badea v. Cox*, 931 F.2d 573, 575 n.2 (9th Cir. 1991) (declining to affirm the district court on an alternative basis "as a prudential matter," because the issue had not been briefed by the government, and raised a question of first impression in this Circuit) (internal quotation marks omitted).

The majority disagrees, maintaining that we should not exercise our prudential jurisdiction to support the district court's denial of immunity, because "a grant of immunity is not interlocutorily appealable at all." Maj. Op. at 2562 n.5. This reasoning, once more, mischaracterizes the state of play. The district court did not grant the Holy See immunity except with regard to the fraud cause of action; as to the rest of Doe's complaint, the district court denied immunity. The exercise of available jurisdiction is thus necessary to decide whether the district court's denial of immunity should stand. I would conclude that we have jurisdiction to decide the applicability of both the tortious act and commercial activity exceptions to the causes of action that are the subject of the Holy See's appeal — that is, all the causes of action alleged against the Holy See in Doe's complaint except for the fraud cause of action.

II. The Commercial Activity Exception

Given my view of the jurisdictional posture of the case, I would reach the merits of the commercial activity question and hold that, although the district court erred in applying the tortious act exception to preserve federal jurisdiction over Doe's non-fraud negligence claims, the district court's result should be affirmed on the alternative rationale that the commercial activity exception applies.[1]

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[1] The discretionary function exclusion, 28 U.S.C. § 1605(a)(5)(A), and the misrepresentation exclusion, *id.* § 1605(a)(5)(B), only provide foreign states and their instrumentalities a safe harbor from the FSIA's tortious act exception, not from the commercial activity exception. *See Export Group v. Reef Indus., Inc.*, 54 F.3d 1466, 1477 (9th Cir. 1995).

As the majority explains, Doe's complaint sufficiently alleged an employment relationship between Ronan and the Holy See under Oregon law. Maj. Op. at 2572-75 (citing *Fearing v. Bucher*, 977 P.2d 1163 (Or. 1999)). For the reasons explained in greater detail below, I would hold that that relationship constitutes "commercial activity" for purposes of the FSIA.

Ronan was employed not as a member of the Vatican's diplomatic, civil service, or military personnel, the employment of whom we have held to be a quintessentially sovereign activity under the FSIA, but in a non-sovereign — here, religious — capacity. *See Holden v. Canadian Consulate*, 92 F.3d 918, 921 (9th Cir. 1996). Further, Doe's negligence claims are "based upon" the employment relationship between Ronan and the Holy See, as the FSIA requires. 28 U.S.C. § 1605(a)(2). Doe's negligent retention, supervision, and failure to warn causes of action against the Holy See therefore fall within FSIA's commercial activity exception, and the district court has jurisdiction to decide them.

A. The definition of "commercial activity" under the FSIA

The FSIA is often described as having codified the "restrictive" theory of sovereign immunity. *See, e.g.*, H.R. Rep. No. 94-1487, at 7 (1976); *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 487 (1983). Under the restrictive theory, "a state is immune from the jurisdiction of foreign courts as to its sovereign or public acts (*jure imperii*), but not as to those that are private or commercial in character (*jure gestionis*)." *Saudi Arabia v. Nelson*, 507 U.S. 349, 359-60 (1993).

The Supreme Court has explained that a foreign state engages in "commercial" activities when it "do[es] not exercise powers peculiar to sovereigns," but rather "exercise[s] only those powers that can be exercised by private citizens." *Republic of Argentina v. Weltover*, 504 U.S. 607, 614 (1992) (alteration in original) (internal quotation marks omitted). Clarifying the statute's requirement that courts look not at the "purpose" of a foreign state's actions but rather at the "nature" of its actions, 28 U.S.C. § 1603(e), *Weltover* explained that "the question is not whether the foreign government is acting with a profit motive or instead with the aim of fulfilling uniquely sovereign objectives," but whether the government's actions "are the *type* of actions by which a private party engages in" commerce. 504 U.S. at 614. The reason *why* the sovereign engages in that activity — its purpose or motive — is immaterial.

What is more, no profit need be made, or need even be possible, for the activity to qualify as "commercial." In *Weltover*, Argentina's issuance of bonds to refinance its debt was held to be "commercial activity," even though the consideration Argentina received for them was "in no way commensurate with [their] value." *Id.* at 616 (alteration in original). That fact, the Court held, "ma[de] no difference," because "[e]ngaging in a commercial act does not require the receipt of fair value, or even compliance with the common-law requirements of consideration." *Id.* Applying this understanding, courts have found that non-profit organizations can engage in commercial activity. *See, e.g.*, *Malewicz v. City of Amsterdam*, 362 F. Supp. 2d 298, 314 (D. D.C. 2005) (holding that the loan of artwork by a Dutch non-profit museum to non-profit museums in the United States constitutes commercial

activity, because exchanging artwork is an activity in which private individuals *can* engage, sometimes for profit).

In sum, a foreign state engages in commercial activity when it engages in acts that any private citizen has the power to undertake, regardless of the state's motive or the possibility of making a profit therefrom. Applying the *Weltover* definition of "commercial activity," this Circuit has repeatedly held that an employment relationship between a foreign sovereign and its employee constitutes commercial activity, so long as the employee is not a civil service, diplomatic, or military employee. In *Holden v. Canadian Consulate*, 92 F.3d 918 (9th Cir. 1996), for example, a former "Commercial Officer" in the "Trade and Investment Section" of the Canadian Consulate in San Francisco brought an action alleging that the Canadian government illegally discriminated against her on the basis of sex and age. *Id.* at 919-20. Examining the FSIA's legislative history, we noted that the House Report listed "the employment of diplomatic, civil service, or military personnel . . . by the Foreign state in the United States" as examples of acts that are "public or governmental and not commercial in nature." *Id.* at 921 (quoting H.R. Rep. No. 94-1487, at 16). In contrast, the "employment or engagement of [such other employees as] laborers, clerical staff or public relations or marketing agents would be . . . included within the definition of commercial activity." *Id.* (quoting H.R. Rep. No. 94-1487, at 16). Based on this legislative history, we held that employment "of diplomatic, civil service or military personnel is governmental and the employment of other personnel is commercial." *Id.*

We applied the *Holden* standard to the hiring of a domestic servant for a diplomat's residence in *Park v. Shin*, 313 F.3d 1138 (9th Cir. 2002). Park brought an action against the Deputy Consul General of the Korean Consulate in San Francisco, alleging that during her tenure as a domestic servant in the Deputy Consul General's home, the Deputy Consul General withheld her pay, denied her medical care, and confiscated her passport. *Id.* at 1140-41. We held that the commercial activity exception applied because "[t]he act of hiring a domestic servant is not an inherently public act that only a government could perform." *Id.* at 1145. Because the plaintiff's claims were based on an employment relationship with the defendant, the defendant was not entitled to sovereign immunity. *Id.*

B. The employment relationship between Ronan and the Holy See

Under this understanding of the phrase "commercial activity," Doe's negligence claims without doubt come within the commercial activity exception.

Doe's amended complaint explains that the Holy See has both "ecclesiastical" and "governmental" functions. In its governmental role, the Holy See undertakes certain functions that are undoubtedly sovereign. It maintains a volunteer military to defend the territory of Vatican City, over which it has complete control; it may enact laws with domestic effect and enter into international treaties and compacts with other nations; and it sends and receives

diplomatic representatives to and from other states.[2] Under the analysis we set forth in *Holden*, had Ronan been employed to perform any of these "diplomatic, civil service, or military" functions, his employment by the Vatican would have fallen outside the FSIA's commercial activity exception. 92 F.3d at 921.

But, on the allegations in the complaint, Ronan was not a civil service, diplomatic, or military employee — the types of employees that only sovereign states can employ. Nor is there any evidence that Ronan was "privy to any governmental policy deliberations" or that he engaged in "legislative work" on behalf of the Holy See. *Id.* at 922. Rather, the Holy See hired Ronan to perform ecclesiastical and parochial services — to provide "religious and pastoral guidance, education and counseling services" to the Church's faithful. Providing religious, educational, and counseling services is not a peculiarly governmental function; it is something that non-governmental employers can do.

To reach this conclusion, I do not rely at all on the consideration that "churches receive financial support from their parishioners." Maj. Op. at 2561. The fact that Ronan's provision of pastoral services coincides with and depends upon his parishioners giving donations is neither necessary nor sufficient to show that the Holy See's employment of Ronan is a commercial activity under *Weltover*'s nature-not-purpose test. *Weltover*, 504 U.S. at 614. Instead, the

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[2] *See* U.S. Dep't of State, Background Note: Holy See, July 2008, http://www.state.gov/r/pa/ei/bgn/3819.htm. Although these facts are not mentioned in the complaint, I take judicial notice of them pursuant to Fed. R. Evid. 201(b).

critical factor in the commercial activity analysis in this case is that the Holy See's employment activities alleged in Doe's complaint are not distinctly *sovereign* in nature — that they are the sort of functions that private parties, not just sovereign governments, can perform. *See Holden*, 92 F.3d at 921. So approached, the application of the FSIA commercial activity exception to Doe's complaint is not an "arcane question," *see* Maj. Op. at 2561, but a straightforward matter of applying our own binding case law.

I recognize that the Holy See's dual role as not only a sovereign government but also the head of a worldwide church gives this case a peculiar complexion. But that sense of oddity comes about because the Holy See is a sovereign of a very unusual kind. Both in physical size and number of inhabitants, the land it governs is tiny. Its role as a traditional, sovereign government entity is correspondingly small, when compared to its role in running an extremely large international religious organization.

The fact that the Holy See is unique among sovereigns in this respect does not, however, necessitate deviating from the rules we normally follow in construing and applying the FSIA. The operation of a huge international religious institution is a large task, and one of great importance to many people. But it is not an activity that may be undertaken only by *sovereign* states, which is the focus of the FSIA's commercial activity exception. Indeed, in most cases it is non-governmental entities, not governments, that operate international religious institutions, the Mormon Church and the Greek Orthodox Church being two prominent examples. The FSIA's purpose is not to insulate religious institutions

from suit; it juxtaposes commercial activities not to *religious* activities, but to *governmental* activities. The Holy See differs from other foreign states in the *nature* of the non-sovereign activities it carries out and, in all likelihood, in the ratio of its non-sovereign activities to its sovereign activities. But it is like other sovereigns in the respect essential here: It engages in a range of non-sovereign activities in the United States, and the FSIA's commercial activity exception lifts the shield of immunity from such non-sovereign activities.

The district court nonetheless expressed discomfort with characterizing the Holy See's employment of Ronan as "commercial" activity for FSIA purposes, observing that the Holy See's employment of clergy is "widely viewed as the antithesis of commerciality." *Doe*, 434 F. Supp. 2d at 941. Commerciality and religiosity are, indeed, often viewed as antithetical categories. But, as I have explained, the FSIA's "commercial activity" phrase, as it has been interpreted in the case law, is a term of art, not reliant on common usage, which reflects the special concerns of a sovereign immunity statute. The district court's discomfort notwithstanding, under well-established FSIA principles and our own binding case law the employment relationship that existed between Ronan and the Holy See does constitute "commercial activity of a foreign state."

C. Doe's negligence claims are "based upon" commercial activity

Under the FSIA's commercial activity exception, it is not enough for the plaintiff to show that the defendant engaged in something that qualifies as a commercial activity under the *Weltover* test. The

plaintiff must also show that his cause of action is related to that commercial activity in one of three ways, depending upon the geographical location where the activity occurred. 28 U.S.C. § 1605(a)(2). In Clause 1 of § 1605(a)(2), the FSIA requires that if the foreign state's commercial activity is carried on inside the United States, the plaintiff's cause of action must be "based upon" that activity itself. Alternatively, if the commercial activity is not carried on inside the United States, the plaintiff's cause of action must be "[based] upon" an act performed inside the United States in connection with the commercial activity elsewhere, *id.* [Clause 2], or else "[based] upon" an act performed outside the United States in connection with commercial activity elsewhere that causes a "direct effect" in the United States. *Id.* [Clause 3]. Doe asserts that his claims may go forward under either Clause 1 or Clause 3 of the commercial activity exception.

Saudi Arabia v. Nelson, 507 U.S. 349 (1993), provides the leading interpretation of the FSIA's "based upon" requirement. *Nelson* explained that "[i]n denoting conduct that forms the 'basis,' or 'foundation,' for a claim, the phrase is read most naturally to mean those elements of a claim that, if proven, would entitle a plaintiff to relief under his theory of the case." *Id.* at 357 (internal citations omitted). As the district court here correctly noted, "[t]he commercial activity must do more than *lead to* the injuries plaintiff suffered"; it must be "involved in proving" one of the elements of plaintiff's cause of action. *Doe*, 434 F. Supp. 2d at 943 (quoting *Sun v. Taiwan*, 201 F.3d 1105, 1110 (9th Cir. 2000)) (internal quotations omitted).

Applying this standard, I would hold that Doe's negligence claims were "based upon" the Holy See's

employment of Ronan within the meaning of the statute. The existence of that employment relationship is a necessary element of at least the negligent retention and supervision claims. *See Chesterman v. Barmon*, 82 Or. App. 1, 4 (1986) (in assessing whether plaintiff had sufficiently alleged a negligent retention claim, requiring that the individual who caused the harm be an "employee" of defendant). *See also* Restatement (Second) of Torts § 317 ("A master is under a duty to exercise reasonable care so to control his servant.")[3]; *accord DiPietro v. Lighthouse Ministries*, 159 Ohio App. 3d 766, 772 (2005) (holding that "[i]n order to prevail on a claim of negligent retention, plaintiff must establish . . . the existence of an employment relationship") (internal quotation marks and citation omitted).

Because Ronan's activities pursuant to the employment relationship occurred inside the United States, it may be that Clause 1 of the FSIA's commercial activity provision is satisfied: Arguably, the Holy See's alleged negligent acts were "based on" an employment relationship that, at least in part, was "carried on in the United States," as well as in Rome. 28 U.S.C. § 1605(a)(2) [Clause 1]. Whether or not Clause 1 applies, however, I think it quite clear that jurisdiction arises under § 1605(a)(2)'s Clause 3, regarding acts performed outside U.S. territory in connection with a foreign state's commercial activity

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[3] I rely on the Restatement (Second) of Torts as evidence of Oregon law because it is frequently relied on by the Oregon Supreme Court in negligence cases. *See, e.g.*, *Wallach v. Allstate Ins. Co.*, 344 Or. 314, 320 (2008); *Bailey v. Lewis Farm, Inc.*, 343 Or. 276, 285 (2007).

that have a "direct effect" inside the United States. *Id.* [Clause 3].

Doe alleges that the Holy See participated in the decision to retain and reassign Ronan rather than terminating his employment, an act that we can infer was taken outside the United States in connection with Ronan's employment, and that had a direct effect in the United States — Ronan's ability to carry out his molestation of Doe. Taking his allegations as true, Doe has satisfied Clause 3 as to his negligent supervision and retention claims.

Determining whether Doe's "failure to warn" claim is based upon the alleged employment relationship requires looking to Oregon's "failure to warn" case law, of which there is relatively little. In general, under Oregon law, a defendant is not liable for a negligent omission that leads to a plaintiff being harmed by a third party unless the defendant has a "special relationship" either to the third party or to the plaintiff. *See* Restatement (Second) of Torts § 302 cmt. a. Such a special relationship may exist if, for example, the defendant "has brought into contact or association with the other a person whom the actor knows or should know to be peculiarly likely to commit intentional misconduct." Restatement (Second) of Torts § 302B cmt. e(D); *cf. Brown v. Washington County*, 163 Or. App. 362 (1999) (holding that defendant could be held liable for failure to warn about the dangerousness of an inmate within its custody).

According to Doe's complaint, it was the Holy See's continued employment of Ronan in a position of authority that led to Doe's contact with Ronan, and thus to the Holy See's duty to warn Doe and the other

parishioners about Ronan's abusive past and potential future dangerousness. So Doe's negligent failure to warn claim is also "based upon" a commercial activity, in that it is the result of non-sovereign actions undertaken elsewhere — the decision not to warn about an employee's dangerousness — with a "direct effect" in the United States. § 1605(a)(2) [Clause 3]. I would therefore hold that the district court has jurisdiction to decide it.

D. The "essence" of Doe's claims

Although the district court determined, as I would, that Doe's allegations satisfied the requirements of the commercial activity exception, it ultimately held the commercial activity exception inapplicable. *See Doe*, 434 F. Supp. 2d at 941-42. It did so because, following what it considered to be "the overarching principle in *Nelson*," it concluded that it could not "fairly characterize[ ] [the activities described in the complaint] as commercial." *Id.* at 947. Rather, it explained that "at the heart of plaintiff's complaint is the injury inflicted by a sexually abusive priest at plaintiff's church, a claim clearly sounding in tort." *Id.* at 942. On the district court's reading of *Nelson*, if the "essence" of a plaintiff's complaint sounds in tort, *id.*, the plaintiff's claims can proceed only under the FSIA's tortious act exception, or not at all.

The Sixth Circuit recently came to a similar conclusion in *O'Bryan v. Holy See*, Nos. 07-5078, 07-5163, 2009 WL 305342 (6th Cir. Feb. 10, 2009). *O'Bryan* held that, because the "true essence" or "gravamen" of the wrongful activities alleged in the plaintiff's complaint sounded like torts, the court could exercise jurisdiction over the Holy See only through

the FSIA's tortious act exception. *O'Bryan*, 2009 WL 305342, at *11-12, 16-17. It therefore held the commercial activity exception inapplicable to the Holy See's employment activities.

I disagree that the arguably tortious "essence" of Doe's claims renders the commercial activity exception unavailable to him. Nothing in the FSIA suggests that the commercial activity exception and the tortious act exception are mutually exclusive and cannot possibly apply to the same conduct. Nor does *Nelson*, or any other controlling case, authorize reading such a requirement into the statute.

In *Nelson*, the plaintiff entered into an employment contract in the United States with a Saudi Arabian hospital operated by the government of Saudi Arabia. 507 U.S. at 351-52. He then moved to Saudi Arabia, where he worked as an engineer for the hospital. *Id.* at 352. After he reported several safety violations to his superiors, he was arrested by the Saudi national police, imprisoned, and tortured. *Id.* at 352-53. He sued in U.S. federal court, alleging several intentional tort causes of action based on his imprisonment and torture, as well as a claim regarding the hospital's negligent failure to warn him, during the contract negotiations in the United States, that he would be subject to imprisonment and torture if he reported safety violations. *Id.* at 353-54. He argued that there was jurisdiction over his claims under the first clause of the commercial activity exception.

The Supreme Court concluded that there was no jurisdiction over any of his causes of action. His intentional tort claims could not proceed under the commercial activity exception because "a foreign

state's exercise of the power of its police" is an act "which is peculiarly sovereign in nature," and therefore not "commercial" within the meaning of the FSIA. *Id.* at 361. As to the "failure to warn" claim, the Court concluded that the plaintiff could not meet the statute's requirement that his claim be "based upon the commercial activity" of Saudi Arabia merely by phrasing his claim in terms of the contract negotiations in the United States during which the failure to warn allegedly occurred. "[A] plaintiff could recast virtually any claim of intentional tort committed by sovereign act as a claim of failure to warn. . . . To give jurisdictional significance to this feint of language would effectively thwart the Act's manifest purpose." *Id.* at 363.

In analyzing the failure to warn claim, then, *Nelson* simply applied the general principle that the court does not accept a plaintiff's mischaracterization of the legal significance of the facts he has alleged, but will look "beyond the complaint's characterization to the conduct on which the claim is based." *Blaxland v. Commonwealth Dir. of Pub. Prosecutions*, 323 F.3d 1198, 1203 (9th Cir. 2003) (quoting *Mt. Homes, Inc. v. United States*, 912 F.2d 352, 356 (9th Cir. 1990)).[4]

Here, unlike in *Nelson*, Doe's negligent retention, supervision, and failure to warn claims are not simply a "feint of language" to obtain jurisdiction through the commercial activity exception. *Nelson*, 507 U.S. at 363.

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[4] For example, if a plaintiff has alleged conduct that clearly amounts to false arrest, but has called his claim one for "false imprisonment," the court will not simply accept that latter characterization. *Blaxland*, 323 F.3d at 1204-06.

Doe has alleged that the Holy See continued to employee Ronan, and placed him in the Archdiocese where he molested Doe, even after the Holy See was aware that Ronan had molested young boys on at least two prior occasions while in its employ. He has alleged further that the Holy See did not inform Doe or his parents of what it knew about Ronan's dangerousness, despite its position of trust with respect to Doe and its employment relationship with Ronan. Doe's negligence claims are not a mischaracterization of the factual allegations he has made, but are in fact among the central wrongs he alleges.[5]

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[5] Nor does our decision in *Randolph v. Budget Rent-A-Car*, 97 F.3d 319 (9th Cir. 1996), require any different result. *Randolph* concerned a Saudi student trainee studying in the United States on a scholarship from Saudia airlines, an instrumentality of the Saudi government. *Id.* at 327. While living in this country, the student "negligently crashed his rented automobile into John Randolph's motorcycle." *Id.* at 323. We held that Randolph's respondeat superior claims against Saudia could not come within the tortious act exception to the FSIA because the student was not an "employee" of Saudia. *Id.* at 325-29. Addressing the commercial activity exception, we concluded that the lack of an employment relationship meant that the allegations simply had no nexus to any commercial activity of Saudia: "[N]ot only must the activity be commercial in nature, but the commercial activity must cause the harm alleged. . . . The specific acts of which plaintiff complains did not arise out of Saudia's commercial activity in the United States." *Id.* at 324.

We also observed that "plaintiffs' personal injury lawsuit sounds in tort and centers on the non-commercial negligence of a purported employee." *Id.* This observation, however, must be considered in the context of the conclusion that there was no employment relationship between Saudia and the student. In the absence of such a connection, there was only the tort of negligent driving by a student unconnected to Saudia, and no "commercial activity." In this case, in contrast, Doe has clearly alleged an

In summary, I see no reason why claims arising from actions with an arguably tortious "essence" cannot proceed under the commercial activity exception. As noted above, the phrase "commercial activity" in the FSIA is a term of art. Neither the statute, nor any controlling case, requires the conclusion that the commercial activity exception is necessarily inapplicable whenever the label "tort" would be, in common usage, a better description of the harms a plaintiff alleges.

E. The Holy See's First Amendment argument

The Holy See contends that reading the FSIA to allow federal jurisdiction over Doe's claims via the commercial activity exception would violate the First Amendment, because adjudicating the case will require the judicial interpretation of such religious doctrine as the vow of obedience that members of the clergy offer to the Pope. This contention cannot get off the ground because, as a foreign sovereign, the Holy See has no rights under the First Amendment.[6]

Neither we nor the Supreme Court have previously addressed whether foreign sovereigns enjoy the benefit of any rights under the Constitution of the United States. *Cf. Weltover*, 504 U.S. at 619 (leaving open the

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employment relationship between the Holy See and Ronan and a nexus between the employment relationship and the harm he suffered. That relationship supplies the commercial activity missing in *Randolph*.

[6] The Archdiocese, the Catholic Bishop, and the Order, which are not foreign sovereigns and are residents of the United States, are, of course, entitled to First Amendment protections.

question whether foreign states enjoy rights under the due process clause). The D.C. Circuit, however, has concluded that foreign sovereigns are not entitled to rights under the due process clause of the Fifth Amendment, and much of its reasoning on that question is relevant here. *See Price v. Socialist People's Libyan Arab Jamahiriya*, 294 F.3d 82, 96 (D.C. Cir. 2002).

The D.C. Circuit explained that foreign sovereign nations are not members of the political community for whose benefit the Bill of Rights was adopted. They "are entirely alien to our constitutional system," *id.*, and so the protections to which they are entitled have traditionally been governed not by domestic constitutional law, but by international law. *Id.* at 97; *see also Principality of Monaco v. Mississippi*, 292 U.S. 313, 330 (1934) (foreign sovereigns are "outside the structure of the Union."). Unlike private individuals, "sovereign states interact with each other through diplomacy and even coercion in ways not affected by constitutional protections." *Nat'l Council of Resistance of Iran v. Dep't of State*, 251 F.3d 192, 202 (D.C. Cir. 2001). They also have recourse to international dispute-resolution mechanisms to which private individuals have no access. Indeed, the FSIA is in part a recognition that grievances against foreign states are sometimes better resolved in these other arenas, not in U.S. courts. In this context, there seems no basis for extending constitutional protections to foreign states in their capacity as such. *Accord O'Bryan v. Holy See*, 471 F. Supp. 2d 784, 794 (W.D. Ky. 2007) (the "Holy See cannot simultaneously seek the protections of the FSIA and the United States Constitution.").

In addition, as the D.C. Circuit observed in *Price*, "serious practical problems might arise were we to hold that foreign states may cloak themselves in the protections of the" Constitution. *Price*, 294 F.3d at 99. It would be thoroughly anomalous to permit the executive branch to be constrained in its conduct of foreign relations by assertions by foreign sovereigns of entitlement to the protections of the First Amendment. I would therefore reject the Holy See's contention that foreign sovereigns have First Amendment rights under the U.S. Constitution, holding that the district court's exercise of jurisdiction over Doe's claims presents no First Amendment concerns.

III. CONCLUSION

For the foregoing reasons, I would affirm the district court's judgment, holding that the FSIA's commercial activity exception permits it to exercise jurisdiction over Doe's non-fraud negligence claims.

FERNANDEZ, Circuit Judge, concurring:

I agree that we cannot consider the commercial exception to the Foreign Sovereign Immunities Act, 28 USC § 1605(a)(2). But, Judge Berzon does not and has, therefore, gone on to opine that all (or virtually all) activities by churches are actually commercial activity. While I recognize that her opinion cannot be precedential and that a response from me cannot be either, I am loath to leave her disquisition standing alone. Thus, I cannot (or at least will not) refrain from offering my own view on the rather oxymoronic proposition that church functions are commercial.

As I see it, Doe's claim that church functions are simply commercial transactions because parishioners do give donations to the church bespeaks the veriest cynicism about religion and a church's position within religion.[1] Could a church spread the word of God without some funds? Would that it could, but the need for support does not mean that the holy activity is commercial. Is the Mass the marketing of a form of edifying entertainment? Is hearing confessions and giving religious advice — an age-old function of churches — really no more than a commercial activity similar to psychological counseling? Is the sacrament of Holy Eucharist the marketing of bread and wine or is the sacrament of Extreme Unction the marketing of oil? I think not. Normal legal usage and common sense recoil from those possibilities. *See United States v. Lamont*, 330 F.3d 1249, 1254-55 (9th Cir. 2003).

Nor does the statute or the case law suggest that the Holy See's religious activities must be commercial. The FSIA tells us that "[a] 'commercial activity' means either a regular course of commercial conduct or a particular commercial transaction or act." 28 U.S.C. § 1603(d). That does not help much, but it also does not say that every possibly private activity is commercial. It says only that commercial behavior is commercial activity. As the Supreme Court has, somewhat more helpfully, stated:

> [W]e conclude that when a foreign government acts, not as a regulator of a market, but in the

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[1] It may be suggested that whether parishioners donate matters not at all. If so, the result is even more jarring than Doe's proposition.

> manner of private player within it, the foreign sovereign's actions are "commercial" within the meaning of the FSIA. Moreover, because the Act provides that the commercial character of an act is to be determined by reference to its "nature" rather than its "purpose" . . . , the question is not whether the foreign government is acting with a profit motive or instead with the aim of fulfilling uniquely sovereign objectives. Rather, the issue is whether the particular actions that the foreign state performs . . . are the *type* of actions by which a private party engages in "trade and traffic or commerce[.]"

Republic of Arg. v. Weltover, Inc., 504 U.S. 607, 614, 112 S. Ct. 2160, 2166, 119 L. Ed. 2d 394 (1992) (citations omitted). Some have focused on the "private player" language, but what is truly significant is the emphasis on the market and on "trade and traffic or commerce." *Id.*

I fail to see how engaging in providing religious counseling is "trade and traffic or commerce." *Id.* Nor, by the way, can a mere private actor give priestly counseling or consolation to a believer. This does not require a focus on purpose; it goes to the very nature of the religious activity itself. Similarly, we have noted that: "[t]he commercial activity exception applies only where the sovereign acts 'in the market in the manner of a private player.'" *Holden v. Canadian Consulate*, 92 F.3d 918, 920 (9th Cir. 1996). Again, Holy See has not acted in the market at all. It has simply supplied religious counseling to a church communicant, a

service that this unique sovereign entity is designed for.[2]

I think that the problem this case seems to present lies in the fact that Holy See is an unusual type of foreign sovereign. Most governments do, indeed, exist to afford their citizens a degree of physical protection and guidance, so that they may thrive in this world. Holy See is more focused on the next world, and that makes a universe of difference. Because of that, Holy See's sovereign activities are not simply the passage of mortal laws and the enforcement of those. They, basically, encompass the furnishing of the kinds of services that only Holy See can give: its own kind of religious help, guidance and counseling. It may do more than most sovereigns do, but it is not engaged in the market or in commerce.[3]

In short, Holy See may not be your typical sovereign, but neither is it your typical merchant. Does that lead to some kind of impasse? Of course not. It leads back to the statute itself. Holy See is a foreign state and the commercial activity exception does not strip its immunity from it. Something else may do so,

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[2] Similarly, Father Ronan was not simply supplying commercial advice and services, nor was he a domestic servant. *Cf. Park v. Shin*, 313 F.3d 1138, 1140-41 (9th Cir. 2002) (domestic servant service); *Holden*, 92 F.3d at 919 (commercial officer). Rather, he held his position for the purpose of giving the very kind of ecclesiastical services to the faithful that lie at the heart of this sovereign's reason for being.

[3] That is not to say that Holy See could not participate in commercial activities. It is only to say that the activities of the type that are involved here cannot be so dubbed.

but not that exception.[4] We hierophants of the law are adept at redefining ordinary concepts, but it is no more appropriate to declare that religious services are commercial activities than it would be to declare that ponies are small birds.[5]

Therefore, if we had jurisdiction I would not apply the commercial activity exception to this case.

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[4] The Sixth Circuit has reached the same result but for different reasons. *See O'Bryan v. Holy See*, ___ F.3d ___, ___, Nos. 07-5078, 07-5163, 2009 WL 305342, at *9-12 (6th Cir. Feb. 10, 2009). So, too, did the district court in this case. *See Doe v. Holy See*, 434 F. Supp. 2d 925, 946-47 (D. Or. 2006).

[5] *See Regina v. Ojibway*, 8 Crim. L.Q. 137 (Oct. 1965).

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

[Filed June 7, 2006]

No. CV-02-00430-MWM

JOHN V. DOE, Plaintiff,

v.

HOLY SEE, et al. Defendants.

OPINION AND ORDER

MOSMAN, J.,

Plaintiff filed this action against the Holy See, Archdiocese of Portland, and other defendants for the alleged tortious conduct of Father Andrew Ronan, a Catholic priest at St. Albert's Church in Portland, Oregon. Plaintiff asserts three causes of action against the Holy See: respondeat superior, negligence, and fraud. Currently before the court is the Holy See's motion (#133) to dismiss for lack of subject matter jurisdiction. The Holy See, a foreign sovereign, is

presumptively immune from suit under the Foreign Sovereign Immunity Act ("FSIA") unless an exception applies. Plaintiff argues this court has subject matter jurisdiction under both the commercial activity exception and the tortious activity exception. Because the tortious activity exception applies in this case, the Holy See's motion (#133) to dismiss is DENIED.

I. FACTS

Plaintiff filed suit against the Holy See on April 3, 2002, and filed an amended complaint two years later on April 1, 2004. In August 2005, plaintiff properly served the Holy See. The amended complaint alleges defendants Holy See, Archdiocese of Portland, and Order of Friar Servants ("Order") placed Father Andrew Ronan ("Ronan") in St. Albert's Church in Portland in approximately 1965. Pl.'s Compl. ¶ 15. There, Ronan allegedly subjected plaintiff, then 15 or 16, to sexual abuse occurring in the monastery and "surrounding areas." *Id.*

Prior to his placement in Portland, Ronan sexually molested a minor while employed with the Archdiocese of Armagh, at Our Lady of Benburb, Ireland in 1955-1956. *Id.* at ¶ 11. According to church records, Ronan apparently admitted to abusing the youth and was removed from his position due to his admissions. *Id.* Ronan was placed in defendant Order's Chicago province, at the all-boys St. Philip's High School where he worked in the private counseling office. *Id.* at ¶ 12. Three male students made independent reports of sexual abuse committed by Ronan, and Ronan admitted to all three reports. *Id.* Ronan also expressed confusion as to why he would be assigned to work in the private counseling office where temptation to

molest children would be maximized. *Id.* In 1965, Ronan was placed in Portland. *Id.* at ¶ 13.

For purposes of the Holy See's motion to dismiss on grounds of sovereign immunity, the significant portions of the complaint are plaintiff's allegations that bring the Holy See's actions within the commercial or tortious activity exceptions. The most important facts alleged include the following:

(1) Defendant Holy See has unqualified power over the Catholic Church, including each and every individual section of the Church. *Id.* at ¶ 3.

(2) Defendant Holy See directs, supervises, supports, promotes and engages in providing religious and pastoral guidance, education and counseling services to Roman Catholics world-wide in exchange for all or a portion of the revenues derived from its members for these services. The Holy See engages in these activities through its agents, cardinals, bishops and clergy, including religious order priests, brothers and sisters, who engage in pastoral work under the authority of its bishop. *Id.*

(3) Defendant Holy See creates, appoints, assigns and reassigns bishops, superiors of religious orders, and through the bishops and superiors of religious orders has the power to directly assign and remove individual clergy. Defendant Holy See also examines and is responsible for the work and discipline and all those things which concern bishops, superiors

of religious orders, priests and deacons of the religious clergy. *Id.*

(4) Father Ronan was employed by all defendants as a priest. The duties of Ronan's employment included but were not restricted to teaching the word of God and the law of the church, providing pastoral services, spiritual care, guidance and counseling, and obtaining financial support for the church. *Id.* at ¶ 10.

(5) After Ronan admitted to sexually molesting minors in Armagh and Chicago, Defendant Catholic Bishop, acting in accordance with the policies, practices, and procedures of Defendant Holy See, failed to remove or discipline Ronan, or to warn others, including Defendant Archdiocese, of Ronan's propensities. *Id.* at ¶ 11-12.

(6) Despite knowing of Ronan's dangerous propensities to abuse children, the Holy See placed Ronan in defendant Archdiocese in Portland, Oregon. *Id.* at ¶ 13.

(7) Defendants held themselves out as the counselors and instructors on matters that were spiritual, moral and ethical. By maintaining and encouraging such a relationship with plaintiff, defendants entered into a fiduciary relationship with plaintiff. *Id.* at ¶ 14.

(8) When plaintiff was approximately 15 to 16 years old, Ronan, using his position of authority, trust, reverence and control as a Roman Catholic priest, engaged in harmful sexual contact upon the person

of plaintiff on repeated occasions. *Id.* at ¶ 15.

(9) Ronan and Defendants Catholic Bishop, Archdiocese and Order were the agents of Defendant Holy See, acting in furtherance of the purposes of the Defendant Holy See, doing the kinds of acts they were engaged to perform, and were motivated, at least in part, to further the purposes of Defendant Holy See. *Id.* at ¶ 34.

(10) Defendant Holy See, by and through its agents, granted Ronan faculties to perform as a Roman Catholic priest. Defendant Holy See, by and through its agents, also certified and held Ronan out to the community of the faithful as a fit and competent agent of the Holy See and a minister of Christ. *Id.* at ¶ 35.

(11) Plaintiff was molested by Ronan while plaintiff was under the authority and influence of Ronan as a Roman Catholic priest which authority was granted to him by Defendant Holy See, Archdiocese and Order. *Id.* at ¶ 36.

II. SUBJECT MATTER JURISDICTION UNDER THE FSIA

A. Legal Standard Governing Motion to Dismiss under Rule 12(b)(1)

A party challenging the court's jurisdiction under Rule 12(b)(1) may do so either on the face of the pleadings (a facial attack) or by presenting extrinsic evidence to refute the facts alleged in the complaint (a

factual attack). *White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000). "In a facial attack, the challenger asserts that the allegations contained in a complaint are insufficient on their face to invoke federal jurisdiction." *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). In evaluating a facial attack to jurisdiction, the court must accept as true the factual allegations in plaintiff's complaint. *Miranda v. Reno*, 238 F.3d 1156, 1157 n.1 (9th Cir. 2001). Where the attack is factual, the court may consider evidence presented on the jurisdictional issue and resolve factual disputes, if necessary. *Roberts v. Corrothers*, 812 F.2d 1173, 1177 (9th Cir. 1987); *see Valdez v. United States*, 837 F. Supp. 1065, 1067 (E.D. Cal. 1993). The Holy See's motion to dismiss presents a facial attack to plaintiff's amended complaint, and I will accept as true plaintiff's factual allegations. Def.'s Motion to Dismiss ("MTD") at 1.

B. FSIA Statutory Framework

The FSIA is the "sole basis for obtaining jurisdiction over a foreign state in our courts." *Republic of Austria v. Altmann*, 541 U.S. 677, 699 (2004) (internal quotation marks and citation omitted). Structurally, the FSIA articulates the general rule that foreign states are immune from the jurisdiction of the United States courts unless the claim against the foreign state falls within an exception to immunity. 28 U.S.C. §§ 1330(a) & 1604; *Saudi Arabia v. Nelson*, 507 U.S. 349, 355 (1993); *Siderman de Blake v. Republic of Arg.*, 965 F.2d 699, 706 (9th Cir. 1992).

The FSIA places the ultimate burden on the foreign state to show it is immune from suit. 28 U.S.C. § 1605; *Schoenberg v. Exportadora de Sal, S.A. de C.V.*, 930

F.2d 777, 779 (9th Cir. 1991). Initially, the foreign state must show it falls within the protection afforded by the FSIA by showing that it is, in fact, a foreign state. *Siderman*, 965 F.2d at 708 n.9. If the foreign state makes that showing, the burden of production shifts to the plaintiff to show, either by the allegations in the complaint or by extrinsic evidence, that at least one of the FSIA exceptions applies. *Id.* "Once the plaintiff offers evidence that an exception to immunity applies, the party claiming immunity bears the burden of proving by a preponderance of the evidence that the exception does not apply." *Schoenberg*, 930 F.2d at 779 (quoting *Joseph v. Office of the Consulate General of Nigeria*, 830 F.2d 1018, 1021 (9th Cir. 1987)); *Meadows v. Dom. Rep.*, 817 F.2d 517, 522-23 (9th Cir. 1987); *Cargill Int'l S.A. v. M/T Pavel Dybenko*, 991 F.2d 1012, 1016 (2d Cir. 1993).

Here, the sovereign status of the Holy See is not in dispute. Def.'s MTD at 5; Pl.'s Resp. at 2. Plaintiff invokes two exceptions to immunity under FSIA – the commercial activity exception, 28 U.S.C. § 1605(a)(2), and the tortious activity exception, 28 U.S.C. § 1605(a)(5). Before reaching these exceptions, the Holy See makes two threshold arguments.

C. Threshold Arguments in Holy See's Facial Attack

Before reaching the heart of FSIA immunity, the Holy See argues: (1) the court should disregard plaintiff's conclusory allegations, and (2) plaintiff's complaint fails to plead facts with specificity, especially regarding the presumed independence of the separate juridical entities of the diocese and order.

(1) Conclusory Allegations

The Holy See correctly states that on a facial attack, plaintiff's well-pleaded allegations must be taken as true. *Warren v. Fox Family Worldwide, Inc.*, 328 F.3d 1136, 1139 (9th Cir. 2003). Nevertheless, the Holy See urges the court to disregard much of plaintiff's complaint because courts should not "assume the truth of legal conclusions merely because they are cast in the form of factual allegations." Def.'s MTD at 1 (quoting *Warren*, 328 F.3d at 1139).

Certain portions of plaintiff's allegations against the Holy See appear conclusory. For example, Count V alleges vicarious liability on the part of Holy See because "[t]he molestation of the plaintiff occurred while Ronan was acting in the scope of his employment." Pl.'s Compl. ¶ 36. If plaintiff's complaint contained only such conclusory statements on ultimate issues, it would probably not survive a motion to dismiss. However, much of plaintiff's complaint alleges facts, not legal conclusions, regarding the dates, players, and locations involved and descriptions of the hierarchical structure of the church. The Holy See might disagree with these characterizations, but it has not offered contradictory evidence to attack the factual underpinnings of plaintiff's complaint, nor has it explained why plaintiff's allegations are "unwarranted." I find the complaint contains sufficient well-pleaded factual allegations to overcome the argument that it is conclusory.

(2) Specificity and Separateness

The Holy See's second threshold argument urges the court to disregard plaintiff's complaint because it

fails to satisfy the FSIA's requirement of pleading facts with specificity. *See Arriba Ltd. v. Petroleos Mexicanos*, 962 F.2d 528, 537 n.17 (5th Cir. 1992) (in suing a foreign sovereign, plaintiff has a "duty" to allege "specific facts" sufficient to invoke an exception to immunity); *Dames & Moore v. Emirate of Dubai*, 1996 WL 671279 at *6 (N.D. Cal. Nov. 14, 1996) (same); *BPA Int'l, Inc. v. Kingdom of Swed.*, 281 F. Supp. 2d 73, 81 (D.D.C. 2003) (plaintiff must allege sufficient facts for the court to entertain a FSIA suit). The Holy See concentrates the specificity argument on the concept of separateness and points to plaintiff's failure to allege specific facts that would overcome the presumption of independent status accorded to foreign instrumentalities and agencies. *See Arriba*, 962 F.2d at 533.

The FSIA's definition of "foreign state" includes a "political subdivision of a foreign state or an agency or instrumentality of a foreign state." 28 U.S.C. § 1603(a). As explained by the Fifth Circuit, the FSIA's normal burden shifting, in which the foreign sovereign bears the burden of proof on immunity, is subject to an exception where jurisdiction depends on an allegation that the defendant was an agent or instrumentality of the sovereign. *Arriba*, 962 F.2d at 533-34. In that circumstance, the plaintiff bears the burden of proving the agency relationship. *Id.* at 534. Unlike *Arriba*, this is not a case in which plaintiff is suing only a political subdivision, instrumentality, or agent of the sovereign. The defendants in this case include the foreign sovereign Holy See, which is being sued for its own negligence as well as the acts of its "agents." In any case, I will address the Holy See's separateness argument followed by the specificity issue.

(a) Separateness

Holy See relies on *First National City Bank v. Banco Para El Comercio Exterior de Cuba (Bancec)*, 462 U.S. 611 (1983), to support its argument that this court should refrain from finding the Holy See liable for the acts of the separate juridical entities of the Archdiocese and Order. Def.'s Reply at 5. I read *Bancec* to be unhelpful for the position advanced by the Holy See because that case articulated the flip-side of the Holy See's argument – separate juridical entities (government corporations acting independently from the government) should not be held liable for the acts of the sovereign. *Bancec*, 462 U.S. at 626-27. But sometimes, as in the corporate law context, the court will break down the artificial wall or veil between separate juridical entities. The *Bancec* decision carved out two exceptions to the presumption of independence in the international context where it would be appropriate to disregard the corporate entity: (1) "where a corporate entity is so extensively controlled by its owner [sovereign] that a relationship of principal and agent is created;" and (2) where recognizing the separateness of the corporate entity would work fraud or injustice. *Bancec*, 462 U.S. at 629-30.

In *Bancec*, the Cuban government established an autonomous state-owned bank to serve as a credit institution for foreign trade. *Id.* at 613. The state-owned Cuban bank sought to collect on a letter of credit issued by an American bank. *Id.* at 615. Shortly thereafter, the Cuban government seized all of the American bank's assets in Cuba. *Id.* When the Cuban bank brought suit in United States federal district court, the American bank counterclaimed, asserting its right to offset the value of its assets seized in Cuba. *Id.*

at 616. The Cuban bank dissolved, and Cuba stepped into the shoes of plaintiff suing in America while shielding itself from counterclaims by transferring the Cuban bank's assets. *Id.* at 632-33. This substitution of plaintiffs muddied the waters in that the sovereign and its corporation were less easily categorized as separate entities. The Court concluded the American bank could obtain a setoff in its counterclaim, notwithstanding the fact that the Cuban bank was established as a separate juridical entity. *Id.* at 633.

The *Bancec* decision was driven, at least in part, by the procedural history in that the case involved a Cuban instrumentality suing an American company. When a foreign sovereign brings suit in the United States, it waives immunity from counterclaims. 28 U.S.C. § 1607. Justice O'Connor relied on equitable principles to disregard the corporate entity, holding:

> Giving effect to Bancec's separate juridical status in these circumstances, even though it has long been dissolved, would permit the real beneficiary of such an action, the Government of the Republic of Cuba, to obtain relief in our courts that it could not obtain in its own right without waiving its sovereign immunity and answering for the seizure of [the American bank's] assets [in violation of international law]. We decline to adhere blindly to the corporate form where doing so would cause such an injustice. . . . To hold otherwise would permit governments to avoid the requirements of international law simply by creating juridical entities whenever the need arises.

Bancec, 462 U.S. at 632-33 (citations omitted). In other words, a foreign sovereign is not entitled to immunize itself from suit for its own wrongs by hiding behind the separate juridical status of its government corporations.

The Holy See's separateness argument is undercut by its own briefing and an attempted contortion of the instrumentality analysis. Footnote three of the Holy See's reply states: "This is not to suggest that dioceses and orders are instrumentalities of the Holy See – instead, both . . . are even more distant than instrumentalities which can be majority-owned by the foreign sovereign."[1] Essentially, the Holy See culled select phrases from *Bancec* in its attempt to invoke the reverse of the presumption of independent status accorded to foreign instrumentalities, while denying that the diocese and order defendants are instrumentalities, all in order to avoid the piercing of a non-existent "corporate" veil in this religious, non-corporate, setting.

As for the application of the corporate law instrumentality concept to this case, *Bancec* does not win the day for the Holy See. This is not a case in

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[1] If, by describing the Archdiocese and Order as "even more distant than instrumentalities," the Holy See intends to invoke canon law to prove separateness or independence, the Supreme Court has rejected this kind of choice of law. In *Bancec*, the Court declined "[t]o give conclusive effect to the law of the chartering state in determining whether the separate juridical status of the instrumentality should be respected [because doing so] would permit the state to violate with impunity the rights of third parties under international law while effectively insulating itself from liability in foreign courts." *Bancec*, 462 U.S. at 621-22.

which an instrumentality of the Holy See has brought suit in America after which the Holy See dissolved the instrumentality and stepped into its shoes while inequitably shielding itself from counterclaims by invoking principles of corporate separateness. If anything, *Bancec* supports a result contrary to the Holy See's position. That is, viewing the Archdiocese and Order as separate instrumentalities of the Holy See would shield *them* from the wrongs allegedly committed by the Holy See. This is the message of *Bancec*: foreign states cannot avoid their obligations to third parties by engaging in abuses of the corporate form.

(b) Specific Facts Alleging Agent-Principal Relationship

Cases relied upon by the Holy See in arguing plaintiff failed to allege facts sufficient to show an agency relationship are distinguishable. For example, in *BPA Int'l, Inc. v. Kingdom of Sweden*, the plaintiff's complaint alleged, in very general terms, that Sweden engaged in commercial activity because it allegedly owned phone companies Telia and Validation. 281 F. Supp. 2d at 80. The undisputed facts in *BPA Int'l* showed the major wrongdoer was Validation, a subsidiary of parent company Telefos, a company in which both its parent company, Telia, and Sweden held an interest. *Id.* at 81. Notably absent from plaintiff's complaint was any allegation of action taken by Sweden. *Id.* Addressing the instrumentality concept, the district court also evaluated whether plaintiff specifically alleged any facts to overcome the presumption of independence accorded to government corporations acting as separate juridical entities. *Id.* The court concluded, the "extremely tenuous

relationship between Sweden and the alleged conduct," and the non-existence of facts showing control exerted by Sweden over the wrongdoer, was insufficient to show an agency relationship between Validation and Sweden. *Id.* Interestingly, the court's conclusion regarding the lack of agency relationship depended on defendant's submission of affidavits, undisputed by plaintiff, showing Sweden's lack of control over the alleged agents. *Id.*

Here, plaintiff's complaint contains many factual allegations asserting actions or omissions on the part of the Holy See. For example, plaintiff asserts the Holy See employed Ronan and exerted supervision and control over him, Compl. ¶ 10, the Holy See misrepresented Ronan's suitability to serve as a priest, *id.* at ¶ 14, and despite knowing of Ronan's dangerous propensities to abuse children, the Holy See placed him at St. Albert's Church in Portland, *id.* at ¶ 13, and failed to warn those coming into contact with him. *Id.* at ¶ 39. As to the agency relationship, plaintiff also alleges facts regarding the Holy See's exercise of control over individual clergy, the Archdiocese, bishops, and orders. *See* Pl.'s Resp. at 11. These allegations include the following: (1) the Holy See has unqualified power over the Catholic Church including each and every individual section of the church; (2) the Holy See creates, appoints, assigns, and reassigns bishops, superiors of religious orders, and, through the bishops and superiors, it has the power to directly assign and remove individual clergy; (3) all bishops, clergy, and priests vow to show respect and obedience to the Pope; (4) in furtherance of its duty to discipline bishops, priests, and other religious clergy members, the Holy See requires bishops to file a report on a regular basis to outline the status of, and any

problems with, clergy; (5) defendant Order is a religious order "Of Pontifical Right" which means that it is under the ultimate authority of defendant Holy See and not a diocesan bishop; (6) at all times material, the Holy See had the right to control Ronan, the Archdiocese, the Order, and defendant Bishop; and (7) defendants Order and Bishop were acting in accordance with the policies, practices, and procedures of the Holy See when they failed to remove or discipline Ronan and failed to warn others of Ronan's propensities.

Therefore, unlike *BPA Int'l*, it cannot be said that plaintiff's complaint is devoid of factual allegations regarding the Holy See's wrongdoing or its agency relationship with the Archdiocese, Order, and individual clergy. Moreover, defendant Holy See has not offered any affidavit, much less an affidavit undisputed by plaintiff, with facts showing an extremely attenuated relationship between the main wrongdoer, Ronan, and the Holy See. *Contra BPA Int'l*, 281 F. Supp. 2d at 81. This is a facial attack to plaintiff's complaint, and assuming the truth of plaintiff's specific factual allegations, I conclude plaintiff has sufficiently pled the existence of an agency relationship to overcome the presumption of independence accorded to separate juridical entities.

III. DISCUSSION - EXCEPTIONS TO IMMUNITY UNDER FSIA

By enacting the FSIA in 1976, Congress intended to codify the restrictive theory of sovereign immunity[2] under which a state is immune from the jurisdiction of foreign courts as to its sovereign or public acts, but not as to those acts that are commercial or private in character. *Verlinden B.V. v. Cent. Bank of Nig.*, 461 U.S. 480, 488-89 (1983). The two potentially applicable exceptions to immunity in this case are the commercial activity exception and the tortious activity exception.

Plaintiffs in at least two other lawsuits sought to impose liability on the Holy See for the sexual abuse allegedly inflicted by a Catholic priest. *English v. Thorne*, 676 F. Supp. 761, 763- 64 (S.D. Miss. 1987) (dismissing the case against the Holy See for lack of subject matter jurisdiction under the FSIA's discretionary exception to the tortious activity exception); *O'Bryan v. Holy See*, 2005 WL 2487944 (W.D. Ky. Oct. 6, 2005) (extending time for plaintiff to properly execute service on the Holy See). This may be one of the first cases in which a plaintiff has relied, at least in part, on the commercial activity exception to the FSIA in suing the Holy See based on a priest's sexual misconduct. *But see Dale v. Colagiovanni*, 337 F. Supp. 2d 825, 841 (S.D. Miss. 2004) (finding subject

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[2] Under this restrictive theory, "the sovereign immunity of foreign states should be 'restricted' to cases involving acts of a foreign state which are sovereign or governmental in nature, as opposed to acts which are either commercial in nature or those which private persons normally perform." H.R. Rep. No. 94-1487, at 14 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6613 [hereinafter "House Report"].

matter jurisdiction against the Holy See under commercial activity exception where underlying action was based not on a priest's sexual misconduct but on a monsignor's fraudulent scheme to misappropriate insurance company assets), *vacated*, 443 F.3d 425 (5th Cir. 2006).

A. Commercial Activity Exception - 28 U.S.C. § 1605(a)(2)

The commercial activity exception to jurisdictional immunity contains three clauses, any one of which satisfies the exception:

> A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case –
>
> in which the action is based [1] upon a commercial activity carried on in the United States by the foreign state; [2] or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; [3] or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States[.]

28 U.S.C. § 1605(a)(2). Of these three clauses, plaintiff raises only the first and third.

While the phrase "commercial activity" is common to both clauses of the commercial activity exception at issue, a key difference between clause [1] and [3] is what the plaintiff's action must be "based upon." In the

first clause, the action must be based on the commercial activity, whereas in the third clause, the action needs to be based on only some "act . . . in connection with a commercial activity." *See Nelson*, 507 U.S. at 358 (attributing significance to the placement of different descriptions juxtaposed against each other and concluding that "the only reasonable reading of the [first clause] calls for something more than a mere connection with, or relation to, commercial activity.") The other distinction between clauses [1] and [3] is the nature of the requisite jurisdictional nexus. In the first clause, the FSIA requires the commercial activity to be "carried on in the United States" meaning, the activity has "substantial contact" with the United States. 28 U.S.C. § 1603(e). In the third clause, the sovereign's act must have a "direct effect" in the United States.

I will turn to these distinctions between clauses [1] and [3] after a preliminary discussion of "commercial activity," an element common to both. Because "commercial activity" is the most important, yet ill-defined, part of the exception, it is the subject of varying judicial interpretations. Ascertaining its meaning is particularly important in this case. The nature of the Holy See makes it a very unusual sovereign state – quite possibly unique in the entire world. For this reason, its activities are even less easily categorized than those of a "typical" sovereign.

1. Defining "commercial activity"

The FSIA defines "commercial activity" in a frustratingly circular fashion:

> A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

28 U.S.C. § 1603(d). In passing the FSIA, Congress purposely made the definition of "commercial activity" imprecise because it wanted to place the responsibility for making immunity determinations on the courts, "in conformity with the principles set forth in this chapter." 28 U.S.C. § 1602.

(a) Judicial interpretation of "commercial activity"

In 1992, the Supreme Court concluded Argentina's issuance of government bonds constituted "commercial activity" under the FSIA. *Republic of Arg. v. Weltover Inc.*, 504 U.S. 607, 617 (1992). In reaching this conclusion, the Court rejected the profit test, a test that defines commerciality in terms of profit motive, and instead adopted the "private person test." *Id.* at 614. The private person test recognizes that a foreign state engaging in "commercial activities" "'does not exercise powers peculiar to sovereigns'; rather, it 'exercises only those powers that can also be exercised by private citizens.'" *Id.* (quoting *Alfred Dunhill of London, Inc., v. Republic of Cuba*, 425 U.S. 682, 704 (1976)).[3] In light of this restrictive theory of sovereign

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[3] In adopting the private person test, the *Weltover* Court relied on its discussion of the restrictive theory of sovereign immunity in

immunity, the Court offered this articulation of the private person test:

> [W]hen a foreign government acts, not as a regulator of a market, but in the manner of a private player within it, the foreign sovereign's actions are "commercial" within the meaning of the FSIA. Moreover, because [the FSIA] provides that the commercial character of an act is to be determined by reference to its "nature" rather than its "purpose," the question is not whether the foreign government is acting with a profit motive or instead with the aim of fulfilling uniquely sovereign objectives. Rather, the issue is whether the particular actions that the foreign state performs (whatever the motive behind them) are the *type* of actions by which a private party engages in "trade and traffic or commerce."

Weltover, 504 U.S. at 614 (citation omitted) (emphasis in original). Consistent with these principles, the Court postulated that a "foreign government's issuance of regulations limiting foreign currency exchange is a sovereign activity, because such authoritative control of commerce cannot be exercised by a private party; whereas a contract to buy army boots or even bullets is a 'commercial' activity, because private companies can similarly use sales contracts to acquire goods." *Id.* at 614-15; *see also Park v. Shin*, 313 F.3d 1138, 1145 (9th Cir. 2002) ("an activity is commercial unless it is one that only a sovereign state could perform.").

Alfred Dunhill, a case the Court decided in 1976, just six months before Congress enacted the FSIA. *Weltover*, 504 U.S. at 612-14.

In *Weltover*, the Court defined "type of activity" broadly. *Weltover*, 504 U.S. at 614; *Sun v. Taiwan*, 201 F.3d 1105, 1109 (9th Cir. 2000). "'Type of activity' does not refer only to the specific act performed by the government, but rather to a category of conduct. No private party would refinance government debt either, but the Supreme Court has held this activity to be commercial." *Sun*, 201 F.3d at 1109 (explaining *Weltover*). In other words, by removing any consideration of motivation from the analysis, the proper inquiry focuses on categories or types of conduct, not the specific government act. It is the difference between analyzing the refinancing of *government* debt versus the refinancing of debt. Private parties engage in the latter type of conduct regularly, and it is therefore commercial in nature. *See Weltover*, 504 U.S. at 614-16.

Based on the Supreme Court's guidance and the statutory language, other courts have applied these principles to a variety of situations to further clarify the commercial activity exception. *See, e.g.*, *Siderman*, 965 F.2d at 708-09 (sovereign's management of an expropriated business, operation of a hotel, and receipt of profits from the company's operations "are clearly activities 'of a kind in which a private party might engage.'"); *Sun*, 201 F.3d at 1107-08 (sovereign engages in commercial activity when it promotes and operates a cultural tour); *Park*, 313 F.3d at 1145 (hiring domestic servant is commercial activity because it "is not an inherently public act that only a government could perform" even if the hiring was done "in part for the purpose of providing services associated with entertaining guests of the Consulate."); *Joseph*, 830 F.2d at 1024 (sovereign's leasing of property for its consulate is a commercial

activity because by renting from plaintiff, it entered the marketplace as a commercial actor); *Aldy v. Valmet Paper Mach.*, 74 F.3d 72, 75 (5th Cir. 1996) (where industrial company qualified as a "foreign sovereign," commercial activities exception is broad enough to cover suits alleging design and manufacturing defect); *Malewicz v. City of Amsterdam*, 362 F. Supp. 2d 298, 314 (D.D.C. 2005) (sovereign engaged in "commercial activity" when it loaned art pieces to nonprofit museums in the United States because a loan of this type is the kind of thing that a private party *can* do).

The next step, then, in analyzing the commercial activity exception's applicability here, is to determine what activity the Holy See is alleged to have engaged in that might be categorized as commercial. In doing so, it is very important to focus on the gravamen of plaintiff's complaint. *Callejo v. Bancomer, S.A.*, 764 F.2d 1101, 1109 (5th Cir. 1985) (cited with approval in *Nelson*, 507 U.S. at 357). By focusing on the core of plaintiff's complaint, district courts can determine whether "the FSIA plaintiff is simply using creative nomenclature as a 'semantic ploy' to shroud the true essence of its theory" in order to obtain jurisdiction. *Leutwyler v. Office of Her Majesty Queen Rania Al-Abdullah*, 184 F. Supp. 2d 277, 299 (S.D.N.Y. 2001) (citing *Nelson*, 507 U.S. at 363). In the instant case, this focus presents a substantial hurdle to finding subject matter jurisdiction through the commercial activity exception. The true essence of plaintiff's complaint is an allegation of sexual abuse committed by a parish priest. The gravamen of the complaint does not appear to be commercial in nature.

(b) Commercial activity allegedly conducted by the Holy See

Plaintiff argues that it made "numerous allegations to show that the Holy See was acting as a private actor, namely that it was a worldwide organization with the purpose of promoting and expanding its services in return for revenue . . . the basic business plan for the majority of profit seeking corporations in the world." Pl.'s Resp. at 5. Unfortunately, plaintiff devotes only two paragraphs to this crucial issue, and emphasizes profit-motive as the linchpin of commerciality, which is clearly incorrect. Nevertheless, construing the factual allegations in the light most favorable to plaintiff, it seems that plaintiff has alleged the Holy See engaged in commercial activity, including: the "Holy See directs, supervises, supports, promotes and engages in *providing religious and pastoral guidance, education and counseling services* to Roman Catholics world-wide in exchange for all or a portion of the revenues derived from its members for these services." Pl.'s Compl. ¶ 3 (emphasis added). Also, plaintiff alleged the Holy See is responsible for the work and discipline of individual clergy, including the power to directly *assign and remove* individual clergy. *Id.* (emphasis added). Plaintiff alleged that through its agent Ronan, the Holy See "*obtain[ed] financial support* for the church." *Id.* at ¶ 35 (emphasis added). Finally, the Holy See allegedly granted Ronan the authority to work as a priest and held Ronan out to the community as a fit and competent agent. *Id.* at ¶¶ 35-36.

The court must determine whether these "actions that the foreign state performs (whatever the motive behind them) are the *type* of actions by which a private

party engages in 'trade and traffic or commerce.'" *Weltover*, 504 U.S. at 614 (emphasis in original). Difficult as it may be, controlling authority requires the court to divorce from this inquiry the Holy See's religious purpose in engaging in these acts. *Nelson*, 507 U.S. at 360 (it is "a question of behavior, not motivation"). While this method of analysis can be helpful in analyzing the activities of Sweden or Cuba or Argentina, or even the more squarely commercial activities of the Holy See (such as leasing equipment or buying supplies), it is less helpful in analyzing the Holy See's more intrinsically religious activities. Nevertheless, I will attempt the analysis.

Though it is not cited by either party, I find the case of *Sun v. Taiwan* to be particularly instructive on this point. There, the parents of an American student brought a wrongful death action against Taiwan for its failure to exercise reasonable supervision, which allegedly caused their son to drown while participating in a cultural tour of Taiwan. 201 F.3d at 1106-07. The Ninth Circuit looked at the sovereign's acts as opposed to the reason for its acts, explaining "Taiwan may be acting in order to promote Chinese culture and this may in fact be a motivation that would inspire very few private tour operators, but its actions as a promoter, organizer and guide are undoubtably acts of a kind that are undertaken regularly by private parties." *Id.* at 1108.

Like in *Sun*, it may be the case that few private actors would be motivated by a desire to promote a faith, religion, or belief system, but motivation must be stricken from the analysis. In *Weltover*, for example, the Court looked not at the refinancing of "government" bonds, but instead analyzed the

refinancing of bonds in general. Here, in order to describe the activity by its type, the court should remove the word "religious" from the inquiry insofar as it inserts purpose into the court's consideration. Thus, the Holy See's provision of "religious and pastoral guidance, education and counseling services" should be broadly categorized as providing guidance, education and counseling services in general. Clearly, private actors *can* provide counseling services, education and guidance. These are not the kinds of activities in which only government actors may engage.

As for the other alleged activities of the Holy See, private actors regularly impose discipline on individual agents and can assign and remove those agents. This is not the *type* of activity that only a sovereign can do, and therefore it is commercial. Likewise, private parties can and do obtain financial support in the marketplace, and this is true for both non-profit and profit-seeking ventures. The fact that parishioners typically provide financial support without a contractual relationship to the recipient does not matter; donor-donee transactions in the nonprofit realm may still qualify as commercial activities. *See Malewicz*, 362 F. Supp. 2d at 314; *Weltover*, 504 U.S. at 616 ("Engaging in a commercial act does not require the receipt of fair value, or even compliance with the common-law requirements of consideration."). Finally, holding an employee out as one who has the authority to act is the type of activity that private parties conduct in the marketplace.

Under the above analysis, with purpose and motive deleted from the evaluation, the alleged activities of the Holy See might be characterized as commercial. This would be, to say the least, ironic. While the Holy

See undoubtably engages in numerous activities that are squarely commercial, the alleged activities here are widely viewed as the antithesis of commerciality. To describe core religious duties as the equivalent of private commercial activity may superficially apply existing precedent, but ultimately results in a transmogrification of the facts.[4]

Fortunately, the law does not require this result. While there are certain steps of inquiry laid out, the Supreme Court has counseled courts not to lose sight of the ultimate issue: whether the true essence of the complaint is commercial. *Nelson*, 507 U.S. at 363. Here, plaintiff's complaint does not allege property damage, breach of contract for goods or services, product liability, copyright infringement, an indebtedness yet unpaid on a loan or other transaction, or any other theory whose true essence is commercial. Instead, at the heart of plaintiff's complaint is the injury inflicted by a sexually abusive priest at plaintiff's church, a claim clearly sounding in tort.

The typical application of the commercial activity exception, and its relevant caselaw, may not fit very well to this case because of the unusual nature of this sovereign. But in the final analysis, the question is whether the complaint alleges activities that are commercial in nature. It does not. For this reason, this court does not have subject matter jurisdiction under the FSIA commercial activity exception to the Holy See's sovereign immunity.

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[4] It might be possible, under existing precedent, to say that a priest administering communion to a supplicant who makes donations to the church is like a private actor selling bread.

The issue, however, is both novel and close. The court will therefore continue its analysis of the remaining steps of the commercial activity exception as though the activities are commercial. The overarching question of whether the alleged conduct constitutes commercial activity is only the beginning of the analysis for the commercial activity exception. The next steps under clauses [1] and [3] require the court to determine whether plaintiff's suit is based on either the commercial activity or an act in connection with the commercial activity, and whether the Holy See's activities satisfy the requisite jurisdictional nexus to the United States.

2. Commercial activity exception, clause [1]

For there to be jurisdiction under the first clause of the commercial exception, plaintiff's action must be based upon a commercial activity by the Holy See that had "substantial contact" with the United States within the meaning of the FSIA. *Nelson*, 507 U.S. at 356.

(a) ". . . action *based upon a* commercial activity"

The touchstone for determining whether claims are "based upon" commercial activity for purposes of the first clause is the Supreme Court's decision in *Saudi Arabia v. Nelson*. There, the plaintiff responded to recruitment efforts in the United States for doctors to come to Saudi Arabia to work for a Saudi government-owned hospital. 507 U.S. at 351-53. Plaintiff claimed Saudi agents imprisoned and tortured him in retaliation for his reporting to government and hospital officials the safety problems he discovered at

the hospital. *Id.* After his release, plaintiff sued Saudi Arabia, asserting a variety of common law tort theories, including failure to warn. The Court developed this test for meeting the "based upon" element: "In denoting conduct that forms the 'basis,' or 'foundation,' for a claim, the phrase is read most naturally to mean those elements of a claim that, if proven, would entitle a plaintiff to relief under his theory of the case." *Id.* at 357 (internal citations omitted) (citing *Callejo*, 764 F.2d at 1109 (the focus should be on the "gravamen of the complaint")). While recruiting plaintiff, having him sign an employment contract, and subsequently employing him were arguably commercial activities that *led to* plaintiff's injuries, the Court held that they did not form the *basis of* his suit. *Id.* at 358. Rather, plaintiff's suit was based upon the Saudi government's wrongful arrest, imprisonment, and torture of plaintiff – conduct that cannot be considered "commercial" because "a foreign state's exercise of the power of its police has long been understood . . . as peculiarly sovereign in nature." *Id.* at 361.

Footnote four of *Nelson* clarifies what the Court does not address regarding the "based on" element: "We do not mean to suggest that the first clause of § 1605(a)(2) necessarily requires that each and every element of a claim be commercial activity by a foreign state, and we do not address the case where a claim consists of both commercial and sovereign elements." *Id.* at 358 n.4.[5] The Ninth Circuit has relied on this

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[5] In his concurrence, Justice White criticized the majority for sidestepping the fact that defendant's conduct at the very least consisted of both commercial and sovereign elements, thus

footnote to hold that "[t]he entire case need not be based on the commercial activity of the defendant." *Sun*, 201 F.3d at 1109.

Under the Court's holding in *Nelson* and Ninth Circuit interpretation of the same, jurisdiction through clause [1] of the commercial activity exception hinges on a finding that the Holy See's commercial activity itself gives rise to at least one element in plaintiff's claim. The commercial activity must do more than *lead to* the injuries plaintiff suffered, it must be the *basis of* some element in plaintiff's suit. *See Sun*, 201 F.3d at 1109-10 (plaintiff's complaint is not "based on" the commercial activities alleged, "the promotion and application process in the United States," because that "was not conduct involved in proving any of the elements of the Suns' action."); *see also Sugimoto v. Exportadora De Sal, S.A. De C.V.*, 19 F.3d 1309, 1311 (9th Cir. 1994). In other words, if the sovereign's commercial activity is "not conduct involved in proving any of the elements" of plaintiff's cause of action, the "based on" element is not satisfied. *Sun*, 201 F.3d at 1110.

The Holy See argues plaintiff fails to meet the "based on" element because plaintiff's claims are based on the alleged tortious acts of Ronan, not the commercial activity of the Holy See. Def.'s Reply at 11. In support of this argument, the Holy See analogizes to the distinction in *Nelson* where the purported commercial activities *led to* the conduct that eventually injured plaintiff, but such activities were

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presenting the very situation that the Court chose to elude in footnote four. *Id.* at 367.

not the basis of plaintiff's suit. Plaintiff asserts causes of action for respondeat superior, negligence, fraud and conspiracy to commit fraud. The question is whether any element of any of these claims is based on the Holy See's commercial activities, especially in light of Oregon's unique take on employer liability.

(i) Respondeat superior

For the respondeat superior claim, Oregon courts follow an expansive doctrine in which an employer is liable not only for the torts of his employee when the employee is acting within the scope of his employment, *Stanfield v. Laccoarce*, 588 P.2d 1271, 1274 (Or. 1978), but also for the intentional criminal acts of employees if the acts that lead to the criminal conduct were within the scope of employment. *Fearing v. Bucher*, 977 P.2d 1163, 1166 (Or. 1999) (under the expansive theory, "[t]he Archdiocese still could be found vicariously liable, if the acts that were within [the priest's] scope of employment resulted in the acts which led to injury to plaintiff.") (internal quotation marks and citation omitted).[6] In order to establish respondeat superior under Oregon law, plaintiff proves one element by showing Ronan was acting within the scope of his employment in the acts that *led to* the sexual abuse of plaintiff, a basis of liability the Holy See ignores.

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[6] For more on Oregon's recognition of the validity of respondeat superior claims asserted against religious organizations for the sexual misconduct of individual clergy members, see Michael J. Sartor, *Respondeat Superior, Intentional Torts, and Clergy Sexual Misconduct: The Implications of* Fearing v. Bucher, 62 Wash. & Lee L. Rev. 687 (2005).

Oregon's test for respondeat superior, with its "led to" language, injects some confusion into the analysis of commercial activity considering *Nelson*'s caution against finding jurisdiction for commercial activities that merely led to plaintiff's injury rather than forming its basis. The principal commercial activity on which plaintiff relies that led to his sexual abuse was the provision of counseling services to parishioners. The cases do not exactly address the intersection we have here, where, by *leading to* the injuries plaintiff suffered, the commercial activity of providing counseling is the *basis of* some element in plaintiff's suit. *See Sun*, 201 F.3d at 1109-10.

This court has already concluded that the complaint, as a whole, does not state a claim within the commercial activities exception. But even if one analyzes the provision of counseling services in isolation, and views this activity as commercial, there is an inevitable tension between *Nelson* and *Sun*. On one hand, it would be prudent to heed the caution from the United States Supreme Court in finding that it is not enough, under the commercial activity exception, that the commercial activity leads to plaintiff's injury, even if "action leading to injury" is an element in Oregon's expansive theory of respondeat superior. On the other hand, FSIA cases recognize that state law governs the 'scope of employment' determination. *See Randolph v. Budget Rent A Car*, 97 F.3d 319, 325 (9th Cir. 1996) ("where state law provides a rule of liability governing private individuals, the FSIA requires the application of that rule to foreign states in like circumstances") (quoting *Bancec*, 462 U.S. at 622 n.11). Ultimately, this court concludes that the Supreme Court's construction of the federal statutory language controls. Even though plaintiff's respondeat superior

claim alleges commercial activities leading to a tort, this is not enough to meet the *Nelson* Court's interpretation of "based on."

(ii) Negligence

The law of negligence in Oregon is premised on the general foreseeability principle announced in *Fazzolari v. Portland Sch. Dist. No. 1J*, 734 P.2d 1326, 1336 (Or. 1987): "[U]nless the parties invoke a status, a relationship or a particular standard of conduct that creates, defines, or limits the defendant's duty, the issue of liability for harm actually resulting from defendant's conduct properly depends on whether that conduct unreasonably created a foreseeable risk to a protected interest of the kind of harm that befell the plaintiff." In Count VI, plaintiff seems to allege common law negligence against the Holy See because it "knew or reasonably should have known of Ronan's dangerous and exploitive propensities as a child sexual abuser . . . and despite such knowledge, Defendant negligently retained Ronan and failed to warn those coming into contact with him . . . [and] Defendant failed to provide reasonable supervision of Ronan, failed to use reasonable care in investigating Ronan, and failed to provide adequate warning to plaintiff and his family." Pl.'s Compl. ¶ 39.

In a similar case against the Archdiocese in this district, Judge Jones adopted a Findings and Recommendation ("F&R") by Judge Ashmanskas that described the foreseeability element of negligence. *G.B. v. Archdiocese of Portland in Oregon*, 2002 WL 31441220 (D. Or. April 18, 2002). The court explained, "an employer who has knowledge of an employee's predilection to sexually abuse young boys

unreasonably creates a foreseeable risk by allowing the employee uninhibited access to young boys." *Id.* at *6. Here, the Holy See's conduct in retaining Ronan, despite knowing of his propensities, failing to reasonably supervise him, and failing to warn those coming into contact with him, forms the basis for the negligence claim against the Holy See. Assuming the Holy See's conduct in retaining and assigning priests is commercial, such conduct certainly gives rise to the foreseeability element of plaintiff's negligence claim, and therefore meets the *Nelson* test for "based on."

(iii) Fraud or conspiracy to commit fraud

To prove fraud, a plaintiff must establish: a representation, its falsity, its materiality, the speaker's knowledge of its falsity or ignorance of its truth, the speaker's intent that the representation should be acted upon by the listener in the manner reasonably contemplated, the listener's ignorance of the representation's falsity, the listener's reliance on the truth of the representation, the listener's right to rely thereon, and the listener's consequent and proximate injury. *Webb v. Clark*, 546 P.2d 1078, 1080 (Or. 1976). One of the activities the Holy See allegedly conducted was granting Ronan the authority to perform as a priest and holding Ronan out to the community as a fit and competent agent. *Id.* at ¶¶ 35-36. Assuming this activity is commercial, it would establish one of the elements needed to prove fraud – the speaker's intent that the representation should be acted upon by the listener in the manner reasonably contemplated – and therefore meets the *Nelson* test for "based on."

(b) ". . . carried on *in the United States*."

Under the first clause to the commercial activity exception, besides determining whether the claim is "based on" "commercial activity," the court must also analyze whether the sovereign's commercial activity is being "carried on in the United States." 28 U.S.C. § 1605(a)(2). The FSIA's definitions section, § 1603, defines the entire first clause of the exception and relaxes the seemingly stringent nexus of "in the United States" to mean "substantial contact with the United States." 28 U.S.C. § 1603(e). Thus, "[a] 'commercial activity carried on in the United States by a foreign state' means commercial activity carried on by such a state and having substantial contact with the United States." *Id.* The Court did not reach this "substantial contact" element in *Nelson* because it concluded the sovereign did not engage in commercial activity. *Nelson*, 507 U.S. at 356. In the Ninth Circuit's *Siderman* decision, the substantial contact requirement was met by plaintiff's allegations that Argentina advertised in the United States for a hotel in Argentina and solicited American guests through its United States agent. 965 F.2d at 709.

Neither party addresses this element of clause [1], and I read plaintiff's complaint to allege the Holy See's commercial activities have at least substantial contact with the United States. While the Holy See's employment decisions regarding the retaining or assigning of Ronan may have occurred inside the Vatican, the activities arising from those decisions had substantial contact in the United States. Ronan was transferred from Chicago to Portland, Ronan provided guidance and counseling services in Portland, the Holy See allegedly failed to remove Ronan from priestly

duties in Portland, the Holy See allegedly held Ronan out as a fit and competent agent to Portland parishioners, and the Holy See failed to warn Portland parishioners. *Cf. Sun*, 201 F.3d at 1110 (remanding to district court for lack of subject matter jurisdiction because all of the sovereign's conduct giving rise to plaintiff's complaint occurred in Taiwan).

3. Commercial activity exception, clause [3]

The third clause of the commercial activity exception requires the court to consider whether plaintiff's lawsuit: (1) is based "upon an act outside the territory of the United States"; (2) that was taken "in connection with a commercial activity" of the Holy See outside this country; and (3) that "cause[d] a direct effect in the United States." 28 U.S.C. § 1605(a)(2); *Weltover*, 504 U.S. at 611. The Holy See attacks plaintiff's complaint solely on the "direct effect" element. Def.'s Reply at 14-15. In *Weltover*, the Court rejected the contention that an effect is direct only if it is substantial and foreseeable. 504 U.S. at 618. Instead, "an effect is 'direct' if it follows as an immediate consequence of the defendant's activity." *Id.* (internal quotation marks and citation omitted).

The Holy See contends the "direct effect" element is not met where intervening causes or acts of an intermediary (Ronan) create the effect. Def.'s Reply at 15 (citing cases, including: *California v. NRG Energy Inc.*, 391 F.3d 1011, 1024 (9th Cir. 2004) (because sovereign's decisions "affected an intermediary, whose actions in turn affected the U.S., the decisions did not have direct effects within the United States."); *Lyon v. Agusta S.P.A.*, 252 F.3d 1078, 1083 n.3 (9th Cir. 2001) ("'immediate" means "acting or being without the

intervention of another object, cause or agency.'") (citation omitted); *Corzo v. Banco Cent. de Reserva del Peru*, 243 F.3d 519, 525 (9th Cir. 2001) (no direct effect where plaintiff's injuries "were at best secondary or incidental results of the [sovereign's] actions")). Plaintiff argues it sufficiently alleged "direct effects" in the United States because the Holy See was negligent in retaining and supervising Ronan, because the Holy See employed Ronan and is vicariously liable for his actions, and because the Holy See defrauded plaintiff. Both parties rely on *Lyon* to support their respective arguments.

In *Lyon*, the Ninth Circuit found there was a direct effect where a plane that was negligently designed and manufactured by an Italian instrumentality crashed in California, killing two passengers. 252 F.3d at 1083. Interpreting "direct effect" after "eschew[ing] both substantiality and foreseeability," the Ninth Circuit instructed that a proper reading of the phrase, particularly in the context of product liability, "should focus on whether some intervening act broke the chain of causation leading from the asserted wrongful act to its impact in the United States." *Id.* Other product liability lawsuits reach similar results on the direct effect issue. *See, e.g., Vermeulen v. Renault U.S.A., Inc.*, 985 F.2d 1534, 1545 (11th Cir. 1993) ("We can hardly imagine a more immediate consequence of the defendant's activity" than plaintiff suffering injuries in a car accident in Georgia as a result of defendant's negligent design and manufacture of the vehicle's passenger restraint system); *Aldy*, 74 F.3d at 75 (holding plaintiff's allegations that Aldy's death in America was immediate consequence of Valmet's negligent design and manufacturing of the paper machine were sufficient to satisfy "direct effect"). *Aldy*

goes even farther, extending the reach of what constitutes a direct effect by including allegations of negligent failure to warn. *Id.* at 76.

The Holy See makes a strong argument that plaintiff's injuries resulted not from the Holy See's conduct, but from the intervening cause of Ronan's sexual misconduct – the acts of an intermediary created the "effect" and therefore this effect is not an "immediate consequence" of the Holy See's activity. At first glance, this logic makes sense, but a more critical approach is necessary. The Holy See argues "there were a series of intervening causes such as Ronan's contact with plaintiff's family and Ronan's decision to commit sexual abuse." Def.'s Reply at 15. Ronan's contact with plaintiff, however, would not have been possible but for the Holy See's conduct in reassigning Ronan from Benburb to Chicago and then to Portland, each reassignment coming on the heels of Ronan's admissions of sexually abusing minors, and each reassignment taking place without the Holy See warning Ronan's new parishioners. In this way, it cannot be said that plaintiff's injuries were "incidental results" tenuously situated at the end of a causal chain set in motion by the Holy See. *Contra Corzo*, 243 F.3d at 525. Thus, if the activities in question were viewed as commercial, they should be viewed as causing a direct effect in the United States.

To summarize, plaintiff's allegations, if taken as true, might be sufficient under clauses [1] or [3] of the commercial activity exception to remove the Holy See from the presumption of immunity afforded by the FSIA, if these activities could be fairly characterized as commercial. Bus as to that threshold question, I conclude the overarching principle explained in *Nelson*

requires this court to hold the activities alleged in this complaint are not commercial and the Holy See retains sovereign immunity at least as to the commercial activity exception.

B. Tortious Activity Exception - 28 U.S.C. § 1605(a)(5)

The tortious activity exception to sovereign immunity states:

> A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case –
>
> not otherwise encompassed in paragraph (2) above, in which money damages are sought against a foreign state for personal injury or death . . . occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment; except this paragraph shall not apply to –
>
> (A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused, or
>
> (B) any claim arising out of malicious prosecution, abuse of process, libel,

> slander, misrepresentation, deceit, or interference with contract rights[.]

28 U.S.C. § 1605(a)(5).

Plaintiff agrees with the Holy See regarding the effect of the misrepresentation exception contained in 28 U.S.C. § 1605(a)(5)(B). Pl.'s Resp. at 22. Under part (B), plaintiff's fraud cause of action would most likely be barred by the express limitation for claims of misrepresentation. *See Johnsen v. Mel-Ken Motors, Inc.*, 894 P.2d 540, 545 (Or. Ct. App. 1995) (elements to establish intentional misrepresentation and fraud are identical). Therefore, only two of plaintiff's theories of liability against the Holy See require further analysis under the tortious activity exception – respondeat superior and negligence. As to its respondeat superior liability, the Holy See argues the tortious activity exception does not apply because the complaint fails to allege Ronan is an "employee acting within the scope of his employment." As to plaintiff's claim that the Holy See itself acted negligently, the Holy See argues the tortious activity exception does not apply because the entire tort did not occur in the United States, and even if it did, the Holy See is entitled to the safe harbor provided by the "discretionary function" exception found in 28 U.S.C. § 1605(a)(5)(A).

(1) Respondeat superior liability

Under the plain language of the statute, the Holy See is not immune from the jurisdiction of this court for plaintiff's injuries if they were "caused by . . . any official or employee of [the Holy See] while acting

within the scope of his office or employment." 28 U.S.C. § 1605(a)(5).

(a) Was Ronan an employee or agent of the Holy See?[7]

Under the FSIA's tortious activity exception, the question of whether Ronan was an "employee" of the Holy See is governed by Oregon state law. *Randolph*, 97 F.3d at 325. In *Randolph*, plaintiffs were injured in a car accident and sought to establish jurisdiction under the tortious activity exception. The Ninth Circuit confronted the question of whether a Saudi Arabian student trainee, in the United States on a state-sponsored scholarship, qualified as an "employee" of the sovereign. *Id.* The court applied California law and concluded the student was not an "employee" because "his activities in the United States did not aid [the sovereign] in its daily operations or confer an immediate benefit on [the sovereign]." *Id.* at 326.

Under Oregon law, an employment relationship turns on "the right of one party to control the activities of the other." *Jenkins v. AAA Heating & Cooling, Inc.*, 421 P.2d 971, 973 (Or. 1966); *see also Schaff v. Ray's Land & Sea Food Co.*, 45 P.3d 936, 942 (Or. 2002) (an employee is a person "who with respect to the physical

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[7] The Holy See's MTD attacks plaintiff's complaint on the grounds that it does not sufficiently plead that the Order, Archdiocese, and Bishop were "agents" of the Holy See because those entities are presumed to be separate juridical entities. I rejected this argument in part II(C)(2)(b) of this opinion. This section focuses on the sufficiency of plaintiff's allegations regarding Ronan's employment.

conduct in the performance of the services is subject to the other's control or right to control."). The Holy See overemphasizes the phrase "control the physical conduct" in arguing that it clearly did not exert this kind of control over Ronan's job performance. Def.'s MTD at 15. This interpretation is too narrow and overlooks Oregon's principle test of whether an individual is an employee – the "right to control performance" test. *Jenkins*, 421 P.2d at 973.

There are four factors the Oregon courts consider in applying the right to control test: "(1) direct evidence of the right to, or exercise of, control; (2) the furnishing of tools and equipment; (3) the method of payment; and (4) the right to fire." *Stamp v. Dep't of Consumer & Bus. Servs.*, 9 P.3d 729, 731 (Or. Ct. App. 2000). "No single factor is dispositive in all instances," but in some cases, "a single factor that indicates an employer-employee relationship" may be sufficient to establish employee status. *Id.* at 733-34 (satisfying all four factors is not a prerequisite to classifying worker as an employee).

Plaintiff's response lists the allegations made in the complaint establishing Ronan was an employee or agent of the Holy See. Pl.'s Resp. at 14. These allegations include: the Holy See employed priests, including Ronan, to provide religious and pastoral services, Compl. ¶ 10; Ronan was a Roman Catholic priest under the direct supervision and control of the Holy See, *id*; all priests vow to show respect and obedience to the Pope and their bishop, *id.* at ¶ 3; the Holy See examines and is responsible for the work and discipline and all those things which concern priests, *id*; despite knowing of Ronan's dangerous propensities, the Holy See placed Ronan in Portland, *id.* at ¶ 13; the

Holy See had the right to control its agent Ronan, *id.* at ¶ 34; the Holy See, by and through its agents (the Archdiocese, Bishop, and Order) granted Ronan facilities to perform as a priest, *id.* at ¶ 35.

Putting aside the conclusory allegations that "the Holy See employed Ronan," and "had the right to control its agent Ronan," and taking plaintiff's other allegations to be true, it appears that plaintiff has sufficiently alleged facts to show Ronan was an employee. On the first factor, the right to exercise or actual exercise of control, plaintiff alleged the Holy See not only had the *right* to control Ronan, *id.* at ¶ 34, but also actually exercised this right when it "placed Ronan in Portland, Oregon." *Id.* at ¶ 13. The Holy See does not offer evidence to contradict this allegation of its involvement in transferring a known child-molester. In addition, plaintiff alleges facts going to the second factor in that the Holy See, through its agents, furnished Ronan with facilities (similar to tools and equipment) to perform his duties. *Id.* at ¶ 35. Plaintiff does not allege facts in support of the third factor, the manner in which Ronan received compensation. Finally, on the fourth factor, plaintiff's complaint asserts the Holy See is responsible for disciplining priests, *id.* at ¶ 3, which, generously construed, would include a right to fire or terminate their employment. In sum, plaintiff alleged facts supporting at least three of the four factors in the right to control test, and therefore, sufficiently alleged Ronan was an employee of the Holy See.

(b) Was Ronan acting within the scope of his employment?

Under the FSIA, "[t]he 'scope of employment' provision of the tortious activity exception essentially requires a finding that the doctrine of respondeat superior applies to the tortious acts of individuals." *Joseph*, 830 F.2d at 1025. Again, whether a sovereign's employee acted within the scope of his employment is governed by state law. *Id*; *Randolph*, 97 F.3d at 326-27. The Holy See acknowledges the Oregon case of *Fearing v. Bucher*, and relies on it for the proposition that sexual abuse by a priest is *not* within the scope of his employment. Def.'s MTD at 17. However, this incomplete description of *Fearing*'s holding is misleading.

As previously explained, Oregon has adopted an expansive theory of 'scope of employment' in which an employer is liable not only for the torts of his employee when the employee is acting within the scope of his employment, *Stanfield*, 588 P.2d at 1274, but also for the intentional criminal acts of employees if the acts that lead to the criminal conduct were within the scope of employment. *Fearing*, 977 P.2d at 1166. There are three requirements that must be met to establish an employee's conduct falls within the scope of his employment: "(1) the conduct must have occurred substantially within the time and space limits authorized by the employment; (2) the employee must have been motivated, at least partially, by a purpose to serve the employer; and (3) the act must have been the kind that the employee was hired to perform." *Id.* (citing *Chesterman v. Barmon*, 753 P.2d 404 (1988)).

Similar to the complaint in this case, the plaintiff in *Fearing* alleged the priest used his position as youth pastor, spiritual guide, and confessor to gain the trust of plaintiff and his family. *Id.* at 1166. By virtue of that relationship, the priest gained the opportunity to be alone with plaintiff, to touch him physically, and then to assault him sexually. Those activities were allegedly committed within the time and space limitations of the priest's employment, and the priest was motivated, at least partially, out of the priest's desire to fulfill his duties as youth pastor and priest. The Oregon Supreme Court concluded these allegations were sufficient to establish the priest's conduct leading up to the abuse was within the scope of employment. *Id.* at 1167.

Here, contrary to the Holy See's contention, plaintiff's complaint is based on more than Ronan's ultimate sexual abuse of plaintiff. Plaintiff alleges conduct by Ronan, conduct leading up to his criminal action, that was within the scope of his employment. Specifically, plaintiff alleges Ronan sought and gained the trust of plaintiff and his family and then obtained consent for plaintiff to participate in counseling and other activities. Compl. ¶ 18. This conduct occurred substantially within the time and space limits of his employment because Ronan's duties included providing pastoral services, guidance, and counseling. Second, plaintiff alleges Ronan was motivated, at least partially, by a desire to serve the Holy See. *Id.* at ¶¶ 18, 34. Third, gaining plaintiff's trust and providing counseling to plaintiff were the kinds of actions Ronan was hired to perform. *Id.* at ¶¶ 18, 34-35. Therefore, under *Fearing*, plaintiff has sufficiently alleged facts showing that Ronan's conduct preceding the sexual abuse fell within the scope of his employment. Under

Oregon law, this is sufficient grounds upon which to hold Ronan's employer liable under a theory of respondeat superior.[8]

(2) Negligence liability

In addition to allowing jurisdiction for injuries caused by a sovereign's employees, jurisdiction via the tortious activity exception may also be found based on personal injuries "occurring in the United States and caused by the tortious act or omission of that foreign state." 28 U.S.C. § 1605(a)(5). Count VI of plaintiff's complaint asserts a claim of negligence against the Holy See on the grounds that it knew or reasonably should have known of Ronan's dangerous propensities as a child abuser, but despite such knowledge, negligently retained Ronan and negligently failed to warn those coming into contact with him, thus allowing Ronan to assume positions of trust and authority as a priest where he was able to commit additional wrongful acts. Compl. ¶ 39. Plaintiff alleges the Holy See failed to provide reasonable supervision, failed to use reasonable care in investigating Ronan,

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[8] I acknowledge that I am applying *Fearing*'s respondeat superior analysis here, while declining to apply *Fearing* in analyzing the "based upon" element within the commercial activity exception. *See* part III(A)(2)(a)(i). These are, of course, very different contexts. The commercial activity exception looks to whether the Holy See's commercial activities give rise to at least one element of plaintiff's respondeat superior claim. The tortious activity exception looks to whether Ronan was acting within the scope of his employment. The latter question is purely a question of state law, as to which *Fearing* provides a direct answer. The former question, while involving state law, is ultimately controlled by Supreme Court precedent as to the meaning and scope of a federal statute.

and failed to provide adequate warning to Portland parishioners. *Id.*

The Holy See attacks the applicability of the tortious activity exception as to the negligence claim on two grounds: (a) plaintiff failed to show the entire tort occurred "in the United States," and (b) the discretionary function exception to the tortious activity exception shields the Holy See from this court's exercise of jurisdiction.[9]

(a) Did the Holy See's alleged negligence occur in the United States?

Under the FSIA, "[a] foreign state shall not be immune from the jurisdiction of the courts of the United States in any case . . . in which money damages are sought against a foreign state for personal injury

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[9] On the facts of this case, it appears these two arguments advanced by the Holy See only apply to plaintiff's negligence claim and not to the claim for respondeat superior. That is, the very nature of respondeat superior liability is that a foreign principal can be held liable for the acts of its agent in the United States, even if the actions of the principal were not in the United States. As to the discretionary function exception, the Holy See recognizes the law of the Holy See prohibits sexual abuse. Def.'s MTD at 10 (citing 1983 Code c.1395, § 2). Therefore, in evaluating the applicability of the discretionary function exception to plaintiff's respondeat superior claim, the first step of the two-part test is not satisfied because Ronan had no discretion under the sovereign's law. *Berkovitz v. United States*, 486 U.S. 531, 536 (1998) (holding discretionary function exception does not apply where the sovereign's law "specifically prescribes a course of action for the employee to follow."). In any event, in its briefing the Holy See has only advanced these two arguments against plaintiff's negligence claim.

or death . . . occurring *in the United States* and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment . . . ." 28 U.S.C. § 1605(a)(5) (emphasis added). The Holy See contends that in order to meet the requirements of the tortious activity exception, the entire tort must occur in the United States, including both the injury and the alleged acts or omissions of the foreign sovereign. Def.'s MTD at 18; Def.'s Reply at 20. In support of this argument, the Holy See relies on *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989), and lower court cases from several districts, including *Intercontinental Dictionary Series v. De Gruyter*, 822 F. Supp. 662, 677 (C.D. Cal. 1993) ("in order for the 'noncommercial tort' exception to be applicable, both the tortious acts or omissions and the injury must occur within the United States"). Plaintiff responds with its own interpretation of the FSIA language – the tortious activity exception dictates only that the personal *injury* occur in the United States, but not the omission of the foreign state. The placement of the clause "in the United States" after "injury" but before "caused by act or omission" reinforces plaintiff's reading. But, after reviewing the relevant cases, including controlling Ninth Circuit law, the proper interpretation of "in the United States" lies in the middle ground between the readings advanced by the parties.

Although not cited by either party, the Ninth Circuit has spoken on this issue in *Olsen v. Government of Mexico*, 729 F.2d 641, 645-46 (9th Cir. 1984) *abrogation in part on other grounds recognized by Joseph*, 830 F.2d at 1026. Subsequent Supreme Court and Ninth Circuit law eliminated a distinction

made in *Olsen* and other cases between "planning level" and "operational level" government actions when evaluating the discretionary function exception. *Joseph*, 830 F.2d at 1026. However, *Olsen*'s analysis of "in the United States" has never been overruled and remains good law.

In *Olsen*, an airplane owned and operated by the Mexican government departed Monterrey, Mexico, bound for an airport in Tijuana. *Olsen*, 729 F.2d at 643. Due to adverse weather conditions at the destination, the pilot rerouted the plane into United States airspace to approach Tijuana from the west. *Id.* The pilot failed to maintain proper altitude and, after striking a telephone pole, crashed the plane less than one mile inside the United States. *Id.* at 644. Mexico, relying on *Matter of SEDCO*, 543 F. Supp. 561 (S.D. Tex. 1982), urged the Ninth Circuit to read the tortious activity exception to require all of the alleged tortious conduct to occur in the United States, which would render the exception inapplicable because some of the pilot's alleged negligence took place in Mexican airspace. *Olsen*, 729 F.2d at 646. The Ninth Circuit declined to adopt this interpretation, finding:

> The instant case is distinguishable from *SEDCO* in one crucial respect. In *SEDCO*, *none* of the alleged acts or omissions, only the resultant injury, occurred in the United States. By requiring every aspect of the tortious conduct to occur in the United States, a rule such as in *SEDCO* would encourage foreign states to allege that some tortious conduct occurred outside the United States. The foreign state would thus be able to establish immunity and diminish the rights of injured persons

> seeking recovery. Such a result contradicts the purpose of the FSIA, which is "to serve the interests of justice . . . ."

Id. (citing *Persinger v. Islamic Republic of Iran*, 729 F.2d 835 (D.C. Cir. 1984) as distinguishable on the same grounds). The Ninth Circuit concluded that "if plaintiffs allege at least one entire tort occurring in the United States, they may claim under section 1605(a)(5)." *Id.*[10]

The Holy See relies on *Amerada Hess* to support its argument that the tort exception is inapplicable unless the Holy See's alleged acts or omissions occurred entirely within the United States. Def.'s Reply at 20. In *Amerada Hess*, a Liberian company sued the Argentine Republic for destruction of an oil tanker on the high seas "well outside the 3-mile limit then in effect for the territorial waters of the United States." 488 U.S. at 441. Unlike the facts in our case, neither the injury nor the tortious conduct occurred in the United States. The Supreme Court held the FSIA's tort exception "covers only torts occurring within the territorial jurisdiction of the United States." *Id.*

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[10] It is unclear whether, under *Olsen*, a court has jurisdiction over all of a plaintiff's noncommercial tort claims so long as one occurred in the United States, or if *Olsen* means a court has jurisdiction over *only* those torts occurring in the United States. *See Greenpeace Inc., (U.S.A.) v. State of France*, 946 F. Supp. 773, 785-86 (C.D. Cal. 1996) (holding where plaintiff alleged multiple torts committed by the sovereign, subject matter jurisdiction is determined on a tort-by-tort basis). The answer does not matter for this case because only one of plaintiff's claims, the negligence claim against the Holy See, is under scrutiny for not having occurred "in the United States." Def.'s Reply at 20.

Because plaintiff's negligence claim against the Holy See is supported in part by allegations of action or omission located in Rome, accepting the Holy See's interpretation would compel the conclusion that the exception does not apply. However, *Amerada Hess* does not require this result, and *Olsen* expressly forecloses it. *Olsen*, 729 F.2d at 646. Consistent with the Ninth Circuit's holding in *Olsen*, the *Amerada Hess* decision makes the tortious activity exception applicable to "torts occurring within the territorial jurisdiction of the United States." *Id.* In other words, as long as plaintiff alleges facts sufficient to show both the injury and the conduct (action or inaction) giving rise to the tort occurred in the United States, the exception applies. Nowhere in *Amerada Hess* is the exception made inapplicable by plaintiff's allegations of conduct or injury occurring outside of the United States but going to the same tort. The Holy See's reliance on *De Gruyter*, 822 F. Supp. at 677, and *Persinger*, 729 F.2d at 842, does not alter this conclusion.

I read plaintiff's negligence claim against the Holy See as based on both the Holy See's acts (retaining Ronan, placing him in Portland) and omissions (failure to provide reasonable supervision, failure to use reasonable care in investigating, failure to warn). Clearly, it is difficult to pinpoint the site of an omission. The Holy See's alleged failures could be said to have occurred inside the Vatican where investigation would have occurred, or where warnings could have been issued. On the other hand, it is also possible to situate a failure to warn at the location where such warning would have been heard – Portland, Oregon. Actions are easier to locate, and for purposes of the "in the United States" analysis, I will focus on the Holy See's acts in evaluating whether

there is "at least one entire" tort of negligence occurring in the United States. *See Olsen*, 729 F.2d at 646.

The question then becomes, did plaintiff allege a viable cause of action for the Holy See's negligence based on acts and injury occurring in the United States? In Oregon, a plaintiff may establish negligence by either invoking a special status/relationship that defines defendant's duty, or by alleging defendant's conduct "unreasonably created a foreseeable risk to a protected interest of the kind of harm that befell the plaintiff." *Fazzolari*, 734 P.2d at 1336. Here, plaintiff alleged the Holy See knew or should have known of Ronan's dangerous propensities, Compl. ¶ 39, and despite such knowledge, acted negligently by placing Ronan in St. Albert's in Portland. *Id.* at ¶ 13. This placement occurred entirely within the United States because Ronan was transferred from Chicago to Portland. Certainly, plaintiff's injuries, including his emotional pain, dysfunction, embarrassment, and other psychological injuries, occurred entirely within the United States. Therefore, I find plaintiff has alleged a claim for negligence based on acts and injuries occurring entirely in the United States. *See G.B. v. Archdiocese*, 2002 WL 31441220 at *6 ("an employer who has knowledge of an employee's predilection to sexually abuse young boys unreasonably creates a foreseeable risk by allowing the employee uninhibited access to young boys."). This result is not changed by the fact that plaintiff's complaint alleges many other bases of tortious conduct by the Holy See possibly occurring outside of the United States. *See Olsen*, 729 F.2d at 646 (the exception does not require every aspect of the

sovereign's allegedly tortious conduct to occur in the United States).

(b) Is plaintiff's negligence claim against the Holy See barred by the discretionary function exception?

The Holy See argues it is entitled to the safe harbor provided by the discretionary function exception to the tortious activity exception. This safe harbor dictates that a court does not have jurisdiction over a foreign sovereign for "any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused." 28 U.S.C. § 1605(a)(5)(A). "The existence of the discretionary function [exception] under the FSIA is generally analyzed under the principles developed pursuant to the Federal Tort Claims Act's ("FTCA") discretionary function exception." *Joseph*, 830 F.2d at 1026; *see* House Report at 21. Both parties agree the Holy See's entitlement to this safe harbor is determined by way of a two-part test. *See United States v. Gaubert*, 499 U.S. 315, 322 (1991) (interpreting FTCA's discretionary function exception). First, the court must determine whether the challenged action is "discretionary in nature" or "involve[s] an element of judgment or choice." *Guabert*, 499 U.S. at 322 (quoting *Berkovitz*, 486 U.S. at 536). Second, even assuming the challenged action involves discretion, the court must determine "whether the judgment is of the kind that the discretionary function exception was designed to shield." *Id.* (internal quotation marks and citation omitted).

(i) Whether the challenged action was discretionary.

Analyzing the first prong in this case is straightforward. The court must determine whether the Holy See failed to follow a mandatory rule or policy in relation to the actions challenged in this case. *Berkovitz*, 486 U.S. at 536. If so, its actions were not "discretionary in nature" and the discretionary function exception does not apply. *Id*. Plaintiff has not alleged the Holy See failed to follow a specific mandatory rule or church canon. Thus, the applicability of the discretionary function exception depends on the second prong. Pl.'s Resp. at 19-21.

(ii) Whether the challenged action is the type of judgment that the discretionary function exception is designed to shield.

In analyzing the second prong of the discretionary function exception, "the question of *how* the government is alleged to have been negligent is critical." *Whisnant v. United States*, 400 F.3d 1177, 1185 (9th Cir. 2005) (emphasis in original). In *Whisnant*, the district court erroneously treated plaintiff's claim as one of government negligence in engaging or hiring a contractor to perform maintenance work at a naval base commissary. *Id*. at 1184. In fact, plaintiff's complaint alleged the government "ignored reports and complaints describing the unsafe condition of the meat department, knew or should have known of the dangerous condition, and intentionally or recklessly or both intentionally and recklessly permitted employees and customers to work and shop at the commissary in

spite of the health hazards." *Id.* at 1185. In applying the discretionary function exception, the Ninth Circuit focused on plaintiff's specific allegations that the government "negligently ignored health hazards that were called to its attention," and held this alleged conduct, as opposed to a generalized claim of negligent hiring or negligently designing regulations, was not protected under the discretionary function exception. *Id.* at 1185.

Whisnant is instructive here. The Holy See attempts to characterize plaintiff's negligence claim as one for "negligent hiring or supervision." Def.'s MTD at 22-23. When viewed at this level of generality, it seems clear the Holy's See's employment decisions would satisfy the second prong. *See, e.g., Burkhart v. Washington Metro Area Transit Auth.*, 112 F.3d 1207, 1217 (D.C. Cir. 1997) ("decisions concerning the hiring, training, and supervision of [Metro Transit] employees are discretionary"); *Gustav Schmidt v. Chao*, 226 F. Supp. 2d 191, 197-98 (D. D.C. 2002) ("hiring decisions of a public entity require considerations of numerous factors, including budgetary constraints, public perception, economic conditions, individual backgrounds, office diversity, experience, and employer intuition."); *English v. Thorne,* 676 F. Supp. 761, 764 (S.D. Miss. 1987) (where plaintiff sued the Vatican for negligent hiring, retention and reassignment of a sexually abusive priest, the discretionary function exception barred those claims because, "as to the Vatican, the complaint appears to be an attempt to challenge the policies and/or procedures utilized by the Vatican in instructing or ordaining its priests, matters which are undeniably of a policy-making nature and clearly discretionary functions."). However, in light of *Whisnant*, this court will not accept the Holy See's

rather generic characterization of plaintiff's allegations. 400 F.3d at 1184-85.

According to plaintiff's complaint, the Holy See either knew or should have known that Ronan admitted to sexually molesting one minor in Benburb, after which he was transferred to Chicago where he admitted to sexually molesting three more minors. Compl. ¶ 11-12. Then, "despite such knowledge, [the Holy See] negligently retained Ronan and failed to warn those coming into contact with him" about his dangerous propensities. *Id.* at ¶ 39. In this way, Ronan was "able to assume positions of trust and authority as a Roman Catholic priest, where he was able to commit the wrongful acts against the plaintiff." *Id.* With the challenged conduct thus framed, the question under the second prong is whether the Holy See was making the kind of policy judgment the exception was meant to protect when, without warning parishioners of the known danger, it placed a priest it knew to be a child-molester in a position in which, for the third time, he would have private access to minors. I conclude this challenged action is not the type of judgment the discretionary function exception is designed to shield.

In general, a sovereign's failure to warn of a known danger is not the type of policy-based decision the discretionary function exception was designed to shield. *See Oberson v. U.S. Dep't of Agric.*, 441 F.3d 703, 710-12 (9th Cir. 2006); *Whisnant*, 400 F.3d at 1185. At issue in *Oberson* was whether the Forest Service's failure to post a warning for snowmobilers at an abrupt decline in a trail grade is the type of judgment protected by the discretionary function exception. 441 F.3d at 710-11. Central to the court's holding that this failure to warn is not protected was

the fact that the Forest Service "knew of the hazard through its own investigation, which disclosed that sixteen days prior to [the plaintiff's] accident[,] the hill in question had been the site of a *potentially* serious collision between a snow grooming machine and two snowmobiles." *Id.* at 712 (emphasis added). Even though the hazard at issue had not yet caused injury, the Forest Service's knowledge of the hazard's potential to cause injury was sufficient to remove its failure to warn from the safe harbor afforded by the discretionary function exception. *Id.* Similary, in *Whisnant*, where the agency had notice of a health hazard via safety inspection reports showing the accumulation of mold in the meat department of a commissary, "the government's failure to control the accumulation of toxic mold . . . cannot be protected under the discretionary function exception." 400 F.3d at 1185.

When the government or agency is responsible for creating the danger or exposing the public to a hazard that otherwise would not exist, the failure to warn of the known danger is not the type of judgment the discretionary function was designed to shield. *Sutton v. Earles*, 26 F.3d 903, 910 (9th Cir. 1994). In *Sutton*, the Navy failed to warn boaters of "an obstruction to navigation that the Navy itself placed in navigable waters that the Navy knew to be traversed by pleasure boat traffic." *Id.* at 911. The court found this conduct fell outside the realm of decisions protected by the discretionary function exception because "[a] decision not to warn of a specific, known hazard for which the acting agency is responsible is not the kind of broader social, economic or political policy decision that the discretionary function exception is intended to protect." *Id.* at 910.

Additionally, "[fa]ilure to act after notice of illegal action does not represent a choice based on plausible policy considerations." *Tonelli v. United States*, 60 F.3d 492, 496 (8th Cir. 1995). In *Tonelli*, postal patrons brought an FTCA lawsuit asserting claims of negligent hiring, retention, and supervision against the United States for its continued employment of workers it knew had violated postal laws. *Id.* at 494. The United States argued the claims were barred by the discretionary function exception. The Eighth Circuit, acknowledging that in general, issues of employee supervision and retention involve the exercise of policy judgment, held the discretionary function exception inapplicable because "this action involves allegations that the post office failed to act when it had notice of illegal behavior." *Id.* at 496.

In sum, *Oberson*, *Whisnant*, *Sutton*, and *Tonelli*, support plaintiff's argument that when the Holy See failed to warn parishioners, after notice of Ronan's illegal conduct in sexually molesting four minors, this was not a choice based on plausible policy considerations for which the Holy See is entitled to immunity under the discretionary function exception. Plaintiff's complaint adequately alleges the Holy See knew or should have known of Ronan's dangerous propensities because Ronan openly admitted to his superiors that he sexually molested at least four minors. Pl.'s Compl. ¶ 11 ("According to files and records maintained by the Roman Catholic Church, Ronan was removed from Benburb due to his admissions."). Not only did plaintiff allege the Holy See knew of the danger, but he also alleges the Holy See was responsible, at least in part, for transferring the known danger to Portland, thus exposing parishioners to this hazard. *See Sutton*, 26 F.3d at 910.

Placement of a known child molester in a Portland parish, where he would have unlimited access to young boys for the third time, without warning the new parishioners, is not the kind of discretionary act that the exception is meant to immunize.

This court is mindful of the fact that in certain situations, a failure to warn may qualify as the type of judgment the discretionary function exception was designed to shield; this is true where the failure to warn is a policy-based decision and represents a balancing of competing interests. *See Valdez v. United States*, 56 F.3d 1177, 1180 (9th Cir. 1995) (discretionary function exception does shield agency's failure to post warning signs alongside potentially hazardous stream where the "challenged conduct implicates a choice between the competing policy considerations of maximizing access to and preservation of natural resources versus the need to minimize potential safety hazards."); *Alfrey v. United States*, 276 F.3d 557, 565 (9th Cir. 2002) (discretionary function exception is designed to shield prison official's "judgment about how extensively to search a cell [because the decision] involves a balancing of the potential risk . . . against the inmate's interest in being free from overly intrusive searches"); *Gordon v. Ottumwa Cmty Sch. Dist.*, 115 F. Supp. 2d 1077, 1088-89 (S.D. Iowa, 2000) (school district entitled to discretionary function exception for retaining an alleged abuser because the record contained evidence of the school's balancing of competing policy interests of public safety and fairness to the accused).

The challenged action in this case is not the type of judgment the discretionary function exception is designed to shield because the record is devoid of any

evidence that the Holy See's failure to warn was the result of a policy judgment or was even susceptible to balancing competing policy interests. *Valdez*, 56 F.3d at 1180. Nor does the Holy See advance any policy justification for its action or inaction. *See, e.g.*, *O'Toole v. United States*, 295 F.3d 1029, 1036 (9th Cir. 2002) ("Because the [government] advances no other reason for its actions or inactions aside from the choice to spend its limited funds in other ways, the discretionary function exception does not apply."); *Oberson*, 441 F.3d at 712 ("In the absence of any evidence that the failure to post a warning or remedy the hazard was the product of a policy choice, we conclude that the discretionary function exception did not shield the Forest Service from liability.").

The Holy See failed to offer any evidence or argument that the challenged action, as opposed to personnel decisions in general, is somehow susceptible to policy analysis or is grounded in social, economic or political policy. The Holy See's failure in this regard is attributable, at least in part, to its litigation strategy in mounting a facial, rather than factual, attack to plaintiff's complaint. In the absence of any justification or explanation, the court finds the Holy See did not meet its burden to demonstrate the applicability of the discretionary function exception. *See Marlys Bear Medicine v. United States*, 241 F.3d 1208, 1213 (9th Cir. 2001). Under the formulation of the Holy See's action currently challenged before the court, the Holy See's failure to warn parishioners of a known danger the Holy See itself transplanted into a Portland parish is not susceptible to policy analysis. Therefore, it is not the type of judgment the discretionary function exception was designed to shield and this court has

subject matter jurisdiction over plaintiff's negligence claim against the Holy See.

IV. CONCLUSION

The Holy See's motion to dismiss (#133) for lack of subject matter jurisdiction is DENIED. The commercial activity exception to the FSIA is inapplicable because the gravamen of plaintiff's complaint is not commercial in nature. However, plaintiff's complaint contains factual allegations sufficient to establish the applicability of the tortious activity exception to the FSIA such that plaintiff survives the Holy See's facial attack in this motion to dismiss. Moreover, because the challenged conduct is not the type of judgment the discretionary function exception was designed to shield, and because the record is devoid of any policy-based rationale for the challenged conduct, the Holy See did not meet its burden to demonstrate its entitlement to the safe harbor under the tortious activity exception to sovereign immunity.

IT IS SO ORDERED.

DATED this 7th day of June, 2006.

/s/ Michael W. Mosman
MICHAEL W. MOSMAN
United States District Court

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[Filed March 27, 2009]

No. 06-35563
D.C. No. CV-02-00430-MWM

JOHN V. DOE,
Plaintiff-Appellee,

v.

HOLY SEE,
Defendant-Appellant.

No. 06-35587
D.C. No. CV-02-00430-MWM

JOHN V. DOE,
Plaintiff-Appellant,

v.

HOLY SEE,
Defendant-Appellee.

ORDER DENYING PETITION FOR REHEARING

Before: FERNANDEZ and BERZON, Circuit Judges, and WRIGHT,* District Judge.

Appellant/Cross-Appellee Holy See's Petition for Rehearing is

DENIED.

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* The Honorable Otis D. Wright, II, United States District Judge for the Central District of California, sitting by designation.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

[Filed April 1, 2004]

Case No.: CV 02 430 MO

JOHN V. DOE, Plaintiff, vs. HOLY SEE, (State of the Vatican City), Its Instrumentalities and/or Agents - Does 1-10; ARCHDIOCESE OF PORTLAND IN OREGON, an Oregon Corporation; THE ROMAN CATHOLIC ARCHBISHOP OF PORTLAND IN OREGON, and successors, a corporation sole, dba THE ARCHDIOCESE OF PORTLAND IN OREGON; THE CATHOLIC BISHOP OF CHICAGO, a corporation sole; THE ORDER OF THE FRIAR SERVANTS OF MARY, d/b/a THE ORDER OF THE FRIAR SERVANTS OF MARY, U.S.A., PROVINCE, INC., Defendants.	**AMENDED COMPLAINT** **TRIAL DEMANDED**

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Attorneys for Plaintiff

Plaintiff, for his causes of action against Defendants, alleges that:

PARTIES

1.

Plaintiff John V. Doe is an adult male citizen of the State of Washington. Plaintiff was a minor at the time of all sexual abuse alleged below.

2.

At all times material, Defendant Holy See (State of the Vatican City), (hereinafter "Holy See") is a foreign country. The true names and capacities, whether

individual, corporate, associate or otherwise, of Defendants Does 1-10 are unknown to Plaintiff who therefore sues said Defendants by such fictitious names. When the true names and capacities of said Defendants have been ascertained, Plaintiff will seek leave of court to amend this complaint to allege the true names and capacities. Plaintiff is informed and believes and based thereon alleges that each of the Defendants, as an agent and/or instrumentality of Defendant Holy See, designated as a Doe herein is liable in some manner for the acts, occurrences and omissions hereinafter alleged. Any reference or allegation against Defendant Holy See includes Does 1 through 10.

3.

Defendant Holy See is the ecclesiastical, governmental, and administrative capital of the Roman Catholic Church. Defendant Holy See is the composite of the authority, jurisdiction, and sovereignty vested in the Pope and his delegated advisors to direct the world-wide Roman Catholic Church. Defendant Holy See has unqualified power over the Catholic Church including each and every individual and section of the church. Defendant Holy See directs, supervises, supports, promotes and engages in providing religious and pastoral guidance, education and counseling services to Roman Catholics world-wide in exchange for all or a portion of the revenues derived from its members for these services. The Holy See engages in these activities through its agents, cardinals, bishops and clergy, including religious order priests, brothers and sisters, who engage in pastoral work under the authority of its bishop. The Holy See is supported through the

contributions of the faithful which are received through donations from the dioceses around the world, including those in the United States. Defendant Holy See promotes and safeguards the morals and standards of conduct of the clergy of the catholic church. Defendant Holy See does this by and through its agents and instrumentalities, including the Congregation for the Clergy and the Congregation for Religious both delegated by the Pope and acting on his behalf. It creates, divides and re-aligns dioceses, archdioceses and ecclesiastical provinces. It also gives final approval to the creation, division or suppression of provinces of religious orders. Defendant Holy See promotes the sacred liturgy, directs and coordinates the spreading of its faith and other things necessary to promote the faith. It creates, appoints, assigns and re-assigns bishops, superiors of religious orders, and through the bishops and superiors of religious orders has the power to directly assign and remove individual clergy. All bishops, clergy, and priests, including religious order priests, vow to show respect and obedience to the Pope and their bishop. Defendant Holy See also examines and is responsible for the work and discipline and all those things which concern bishops, superiors of religious orders, priests and deacons of the religious clergy. In furtherance of this duty, Defendant Holy See requires bishops to file a report, on a regular basis, outlining the status of, and any problems with, clergy. Defendant Holy See promulgates and enforces the laws and regulations regarding the education, training and standards of conduct and discipline for its members and those who serve in the governmental, administrative, judicial, educational and pastoral workings of the Catholic church world-wide. Defendant Holy See is also directly responsible for removing superiors of religious orders,

bishops, archbishops and cardinals from service and/or making them ineligible for positions of leadership in the various divisions and offices of the Catholic church.

4.

At all times material, Defendant Archdiocese of Portland in Oregon, was a citizen of the state of Oregon in that it is a corporation incorporated under the laws of the state of Oregon and having its principal place of business in the state of Oregon. At all times material, the Roman Catholic Archbishop of Portland in Oregon, and successors, was a citizen of the state of Oregon in that it is a corporation incorporated under the laws of the state of Oregon and having its principal place of business in the state of Oregon and doing business as the Archdiocese of Portland in Oregon (hereinafter, collectively the "Archdiocese"). Defendant Archdiocese provided pastoral services to Plaintiff and his immediate family through its parishes.

5.

At all times material, Defendant Catholic Bishop of Chicago (hereinafter "Catholic Bishop") was and continues to be a citizen of the state of Illinois in that it is a corporation incorporated under the laws of the state of Illinois and having its principal place of business in the state of Illinois.

6.

At all times material, Defendant The Order of the Friar Servants, d/b/a The Order of the Friar Servants of Mary, U.S.A., Province, Inc. (hereinafter "Order") was and continues to be a citizen of the state of Illinois

in that its principal place of business is in the state of Illinois and operating world-wide, including Benburb, Ireland, Chicago, Illinois and Portland, Oregon with its main headquarters in Italy. Defendant Order is known as a religious Order "Of Pontifical Right" which means that it is under the ultimate authority of Defendant Holy See and not a diocesan bishop. The head of an order, including Defendant Order, is called the Master General or the equivalent. His office is in Rome. He is elected but his election is approved by Defendant Holy See. The individual provinces of an order are headed by provincials who are elected by their members and approved by the head of the order. For an order, such as Defendant Order, and its priests to operate within a diocese, it must obtain the approval of the local bishop within that diocese or area.

JURISDICTION AND VENUE

7.

This court has subject matter jurisdiction pursuant to 28 U.S.C. § 1332 because the amount in controversy exceeds the sum of $75,000, exclusive of interest and costs, and the Plaintiff herein, a citizen of the state of Washington, is diverse in state citizenship from Defendants, citizens of the states of Oregon and Illinois, and a foreign country.

8.

This Court has personal jurisdiction over the Defendants because a tort was committed by the Defendants against Plaintiff in this district. This Court has jurisdiction over the Defendant Holy See and/or Does 1-10 in that the actions that the Plaintiff

complains of involve an activity for which the law provides an exception to sovereign immunity.

9.

Venue is proper in this district pursuant to 28 U.S.C. § 1391 because a substantial part of the events or omissions giving rise to the claim occurred within this district.

FACTS

10.

At all times material, Defendants employed priests, including one Father Andrew Ronan ("Ronan"), to provide religious and pastoral services. Father Ronan was employed by all Defendants as a priest. The duties of Ronan's employment included but were not restricted to teaching the word of God and the law of the church, providing pastoral services, spiritual care, guidance and counseling, and obtaining financial support for the Church. At all times material, Ronan was a Roman Catholic priest, employed by and an agent of Defendant Holy See and Defendant Order, under their direct supervision and control. Ronan was a Roman Catholic priest and employee of Defendant Catholic Bishop from on or about 1961-1965 and Defendant Archdiocese of Portland, from on or about 1965 to 1966. As a Roman Catholic priest, Ronan was under the direct supervision, employ and control of Defendant Archdiocese and Defendant Catholic Bishop. At all times material, Ronan was an adult at the time of the sexual abuse alleged herein. As a Religious Order priest, Ronan was under the

supervision of both the superiors of his order and the bishops of dioceses wherein he was serving.

11.

In approximately 1955/1956, while employed with Defendant Archdiocese of Armagh, at Our Lady of Benburb, Priory, Ireland, Ronan sexually molested a youth. The parents of the youth and/or the youth reported the abuse and left it up to those at Benburb to deal with Ronan. On information and belief, Ronan admitted to abusing the youth. According to files and records maintained by the Roman Catholic Church, Ronan was removed from Benburb due to his admissions. Moreover, in the same files and records, Ronan admitted that this problem went back to his early life, and even though he overcame it for many years, it was still deeply rooted within him. Again, according to the same records and files, Ronan was never to be trusted.

12.

In approximately 1963-1964, Ronan was removed from Benburb and placed in Defendant Catholic Bishop, in Defendant Order's Chicago province, at St. Philip's High School, an all boys high school. While at St. Philip's High School, Ronan molested at least three male students. Each report was made independent of the other. When Ronan was confronted with the allegations, he admitted to abusing the youths. According to files and records maintained by the Roman Catholic Church, when confronted, Ronan admitted that he did not understand why he was assigned to work at a boys' high school in a counselor's private office, where temptation to molest children

would be maximized, given his previous record of molestation in Benburb. Upon information and belief, Defendant Catholic Bishop, acting in accordance with the policies, practices, and procedures of Defendant Holy See, failed to remove or discipline Ronan, or to warn others, including Defendant Archdiocese, of Ronan's propensities. As a result of this conduct, Ronan was subsequently able to have contact with Plaintiff.

13.

Despite knowing of Ronan's dangerous propensities to abuse children, in approximately 1965, Defendant Holy See and Defendant Order placed Ronan in Defendant Archdiocese at St. Albert's Church in Portland, Oregon. Plaintiff came to know Ronan as his priest, counselor and spiritual adviser. Plaintiff was raised in a devout Roman Catholic family, and regularly celebrated mass, received the sacraments, participated in church-related activities. Plaintiff, therefore, developed great admiration, trust, reverence and respect for the Roman Catholic Church and its agents. Thus, Ronan was a person of great influence and persuasion as a holy man and authority figure.

14.

As a result of representations made by Defendants Holy See, Archdiocese, Catholic Bishop, and Order (hereinafter "Defendants") and by virtue of the fact that Defendants held themselves out as the counselors and instructors on matters that were spiritual, moral and ethical, Defendants had domination and influence over Plaintiff. Defendants, by maintaining and encouraging such a relationship with Plaintiff, entered

into a fiduciary relationship with Plaintiff. In addition, by accepting the care, custody and control of the minor Plaintiff, Defendants stood in the position of an *in loco parentis* relationship with the minor Plaintiff. As a result of these special relationships between Plaintiff and Defendants, Plaintiff trusted and relied upon Defendants to nurture and protect him while he was in Defendants care and custody. The power imbalance between Defendants and Plaintiff increased the young boy's vulnerability to Ronan.

15.

In late 1965 or early 1966, when Plaintiff was approximately 15 to 16 years old, Ronan, using his position of authority, trust, reverence, and control as a Roman Catholic priest, engaged in harmful sexual contact upon the person of Plaintiff on repeated occasions. The sexual contact occurred in several places including the monastery and surrounding areas in Portland, Oregon, United States of America.

16.

The sexual abuse of Plaintiff, and the circumstances under which the abuse occurred caused Plaintiff to develop various psychological coping mechanisms and symptoms of psychological distress, including great shame, guilt, self-blame, depression, repression and disassociation. As a result, Plaintiff was unable to perceive or know the existence or nature of his psychological and emotional injuries and their connection to the sexual abuse perpetrated upon him by Ronan.

17.

As a direct result of the sexual abuse and wrongful conduct described herein, Plaintiff has suffered and will continue to suffer severe and permanent emotional distress, physical manifestations of emotional distress, embarrassment, loss of self-esteem, and other psychological injuries; was prevented and will continue to be prevented from performing his normal daily activities and obtaining the full enjoyment of life; has incurred and will continue to incur expenses for medical and psychological treatment, therapy and counseling; and has incurred and will continue to incur loss of income and loss of earning capacity.

COUNT I: VICARIOUS LIABILITY (RESPONDEAT SUPERIOR) AGAINST DEFENDANT ARCHDIOCESE FOR THE ACTS OF THEIR AGENT RONAN

Plaintiff incorporates each and every allegation contained in Paragraphs 1 through 17 of this complaint as if set forth in full herein.

18.

For the purpose of furthering his assigned duties as priest and pastor, Ronan identified Plaintiff's family as one with a young male child, sought and gained the trust and confidence of Plaintiff's mother as friend, spiritual guide, youth pastor, confessor, and priest; sought and gained parental consent for Plaintiff to participate in counseling and other activities, and to spend time alone with him; and sought and gained the parental directive to Plaintiff that he respect Ronan's

authority and guidance and comply with his instruction.

19.

For the purpose of furthering his assigned duties as priest and pastor, Ronan also sought and gained Plaintiff's trust, friendship, admiration, and obedience. As a result, Plaintiff was conditioned to comply with Ronan's direction and to look to him as an authority on matters spiritual, moral, ethical and temporal.

20.

Ronan at all materials times suffered from a mental disorder known as Pedophilia. This disorder caused him to be compelled to perpetrate sexual acts upon young boys. Using the power, authority and trust of his position as priest and youth pastor to Plaintiff and to his parents, Ronan enticed, induced, directed, and coerced Plaintiff to engage in various sexual acts with him. Ronan's sexual molestation of Plaintiff occurred on multiple occasions over a period of several months.

21.

Using the power, authority and trust of his position as priest and youth pastor to the Plaintiff and to his parents, Ronan enticed, induced, directed and/or coerced Plaintiff to engage in various sexual acts with him from approximately 1965 to 1966. Defendant Archdiocese is therefore vicariously liable for the negligent acts and omissions of their agent Ronan.

22.

As a direct result of this sexual abuse and breach of trust, Plaintiff has suffered and will continue to suffer emotional pain and dysfunction to Plaintiff's general damage in an amount to be determined by a jury in excess of $75,000.

23.

As a further result of the molestation, Plaintiff has incurred and/or will continue to incur costs for counseling and psychological treatment in an amount to be disclosed prior to trial, and has lost earning capacity in an amount to be disclosed prior to trial.

COUNT II: NEGLIGENCE AGAINST DEFENDANT CATHOLIC BISHOP

Plaintiff incorporates each and every allegation contained in Paragraphs 1 through 23 of this complaint as if set forth in full herein.

24.

Defendant Catholic Bishop, by and through its agents, servants and employees, knew or reasonably should have known of Ronan's dangerous and exploitive propensities as a child sexual abuser and/or an unfit agent, and despite such knowledge, Defendant negligently retained Ronan and failed to warn those coming into contact with him, including but not limited to Defendant Archdiocese, Plaintiff herein and Plaintiff's family, of Ronan's propensities. Ronan was therefore able to assume positions of trust and authority as a Roman Catholic priest, where he was

able to commit the wrongful acts against the Plaintiff. Defendant failed to provide reasonable supervision of Ronan, failed to use reasonable care in investigating Ronan and failed to provide adequate warning to Plaintiff and his family. Upon information and belief, Defendant Catholic Bishop was acting in accordance with the policies, practices, and procedures of Defendant Holy See.

25.

As a direct result of this negligent conduct, Plaintiff has sustained and continues to sustain the injuries and damages described above in paragraphs 17, 22 and 23.

COUNT III: VICARIOUS LIABILITY (RESPONDEAT SUPERIOR) AGAINST DEFENDANT ORDER FOR THE ACTS OF THEIR AGENT RONAN

Plaintiff incorporates each and every allegation contained in Paragraphs 1 through 25 of this complaint as if set forth in full herein.

26.

For the purpose of furthering his assigned duties as priest and pastor, Ronan identified Plaintiff's family as one with a young male child, sought and gained the trust and confidence of Plaintiff's mother as friend, spiritual guide, youth pastor, confessor, and priest; sought and gained parental consent for Plaintiff to participate in counseling and other activities, and to spend time alone with him; and sought and gained the parental directive to Plaintiff that he respect Ronan's

authority and guidance and comply with his instruction.

27.

For the purpose of furthering his assigned duties as priest and pastor, Ronan also sought and gained Plaintiff's trust, friendship, admiration, and obedience. As a result, Plaintiff was conditioned to comply with Ronan's direction and to look to him as an authority on matters spiritual, moral, ethical and temporal.

28.

Ronan at all materials times suffered from a mental disorder known as Pedophilia. This disorder caused him to be compelled to perpetrate sexual acts upon young boys. Using the power, authority and trust of his position as priest and youth pastor to Plaintiff and to his parents, Ronan enticed, induced, directed, and coerced Plaintiff to engage in various sexual acts with him. Ronan's sexual molestation of Plaintiff occurred on multiple occasions over a period of several months.

29.

Using the power, authority and trust of his position as priest and youth pastor to the Plaintiff and to his parents, Ronan enticed, induced, directed and/or coerced Plaintiff to engage in various sexual acts with him from approximately 1965 to 1966. Defendant Order is therefore vicariously liable for the negligent acts and omissions of their agent Ronan.

30.

As a direct result of this sexual abuse and breach of trust, Plaintiff has sustained and continues to sustain the injuries and damages described above in paragraphs 17, 22 and 23.

31.

As a further result of the molestation, Plaintiff has incurred and/or will continue to incur costs for counseling and psychological treatment in an amount to be disclosed prior to trial, and has lost earning capacity in an amount to he disclosed prior to trial.

COUNT IV: NEGLIGENCE AGAINST DEFENDANT ORDER

Plaintiff incorporates each and every allegation contained in Paragraphs 1 through 31 of this complaint as if set forth in full herein.

32.

Defendant Order, by and through its agents, servants and employees, knew or reasonably should have known of Ronan's dangerous and exploitive propensities as a child sexual abuser and/or an unfit agent, and despite such knowledge, Defendant negligently retained and failed to warn those coming into contact with him, including but not limited to Defendant Archdiocese, Plaintiff herein and Plaintiffs family, of Ronan's propensities. Ronan was able to assume positions of trust and authority as a Roman Catholic priest, where he was able to commit the wrongful acts against Plaintiff. Defendant failed to

provide reasonable supervision of Ronan, failed to use reasonable care in investigating Ronan and failed to provide adequate warning to Plaintiff and his family. Upon information and belief, Defendant Order was acting in accordance with the policies, practices and procedures of Defendant Holy See.

33.

As a direct result of this negligent conduct, Plaintiff has sustained and continues to sustain the injuries and damages described above in paragraphs 17, 22 and 23.

COUNT V: VICARIOUS LIABILITY (RESPONDEAT SUPERIOR) AGAINST DEFENDANT HOLY SEE

Plaintiff incorporates each and every allegation contained in Paragraphs 1 through 33 of this Complaint as if set forth in full herein.

34.

At all times material, Defendant Holy See had the right to control its agents, Defendant Catholic Bishop, Defendant Archdiocese, Defendant Order and Ronan. At all times material, Ronan and Defendants Catholic Bishop, Archdiocese and Order, were the agents of Defendant Holy See, acting in furtherance of the purposes of the Defendant Holy See, doing the kind of acts they were engaged to perform, and were motivated, at least in part, to further the purposes of Defendant Holy See.

35.

Defendant Holy See, by and through its agents, granted Ronan faculties to perform as a Roman Catholic priest. Defendant Holy See, by and through its agents, also certified and held Ronan out to the community of the faithful as a fit and competent agent of Defendant Holy See and a minister of Christ. Ronan was acting as the agent in ministering to the community of the faithful, including performing sacraments, teaching the word of God and the law of the Church and providing aid, comfort and counseling, and obtaining financial support for the church.

36.

Plaintiff was molested by Ronan while Plaintiff was under the authority and influence of Ronan as a Roman Catholic priest which authority was granted to him by Defendant Holy See, Archdiocese and Order. The molestation of the Plaintiff occurred while Ronan was acting in the scope of his employment, the agency relationship with Defendant Holy See, Archdiocese and Order and/or this conduct was committed within the apparent authority arising from this employment and/or agency. Ronan was executing the very employment duties which he was assigned to perform.

37.

Therefore, due to the nature of the employment duties and, the vast disparity of power that existed in this relationship, Defendant Holy See is liable for the negligent and/or wrongful conduct of its agents, including Defendant Catholic Bishop, Defendant Archdiocese, Defendant Order, and its priest Father

Ronan as described in the causes of action herein under the law of vicarious liability, including the doctrine of respondeat superior.

38.

As a direct result of this sexual abuse and breach of trust, Plaintiff has sustained and continues to sustain the injuries and damages described above in paragraphs 17, 22 and 23.

COUNT VI: NEGLIGENCE AGAINST DEFENDANT HOLY SEE

Plaintiff incorporates each and every allegation contained in Paragraphs 1 through 38 of this complaint as if set forth in full herein.

39.

Defendant Holy See, by and through its agents, servants and employees, knew or reasonably should have known of Ronan's dangerous and exploitive propensities as a child sexual abuser and/or an unfit agent, and despite such knowledge, Defendant negligently retained Ronan and failed to warn those coming into contact with him, including but not limited to, Defendant Archdiocese, Defendant Bishop and Defendant Order, Plaintiff herein and Plaintiff's family, of Ronan's propensities. Ronan was therefore able to assume positions of trust and authority as a Roman Catholic priest, where he was able to commit the wrongful acts against the Plaintiff. Defendant Holy See failed to provide reasonable supervision of Ronan, failed to use reasonable care in investigating Ronan

and failed to provide adequate warning to Plaintiff and his family.

40.

As a direct result of this negligent conduct, Plaintiff has sustained and continues to sustain the injuries and damages described above in paragraphs 17, 22 and 23.

COUNT VII: FRAUD AND CONSPIRACY TO COMMIT FRAUD AGAINST ALL DEFENDANTS

Plaintiff incorporates each and every allegation contained in Paragraphs 1 through 40 of this complaint as if set forth in full herein.

41.

Defendants, by and through their agents, servants and employees, knew or reasonably should have known of Ronan's dangerous and exploitive propensities as a child sexual abuser and/or an unfit agent.

42.

Defendants misrepresented, concealed or failed to disclose information relating to sexual misconduct of their agents as described herein. Specifically, Defendants misrepresented and held Ronan out to the community of the faithful as being a fit and competent agent of Defendants and a minister of Christ. Defendants misrepresented that Ronan did not have a history of sexually molesting children and that

Defendants did not know about Ronan's history of sexually molesting children.

43.

Defendants knew that they misrepresented, concealed or failed to disclose information relating to sexual misconduct of their agents. Specifically, Defendants knew that they misrepresented and held Ronan out to the community of the faithful as being a fit and competent agent of Defendants and a minister of Christ. Defendants knew that they misrepresented that Ronan did not have a history of sexually molesting children and that Defendants did not know about Ronan's history of sexually molesting children.

44.

The fact that Defendants' agents, including Ronan, had in the past and/or would in the future be likely to commit sexual misconduct with another minor, that Ronan had a history of sexually molesting children, and that Defendants knew about Ronan's history of sexually abusing children was a material fact in Plaintiff's and his family's decision whether or not to allow Plaintiff to attend and participate in activities at St. Albert's Church in Portland, Oregon and with Defendants' agent - Ronan.

45.

Upon information and belief, Defendants misrepresented, concealed and failed to disclose the material facts to Plaintiff and his family with the intent to avoid scandal, to keep Plaintiff and his family going to and paying money to St. Albert's Church in

Portland, Oregon, to keep Plaintiff and his family in the Community of Faithful, and in order to maintain an adequate number of agents.

46.

Plaintiff and his family were justified in relying on these misrepresentations, concealment and non-disclosures because of the power imbalance between the parties, Plaintiff's age, and Plaintiff's trust and confidence in Defendants. Had Plaintiff or his family known about Ronan's history of sexually abusing children, Plaintiff would have acted differently and not been in a position to be sexually abused.

47.

Upon information and belief, Defendants, in concert with each other, with the intent to conceal and defraud, conspired and came to a meeting of the minds whereby they would misrepresent, conceal or fail to disclose information relating to the sexual misconduct of Defendants' agents, including Ronan. By so concealing, Defendants committed at least one act in furtherance of the conspiracy.

48.

As a direct result of Defendants' fraud and conspiracy and Plaintiff's justifiable reliance, Plaintiff has sustained and continues to sustain the injuries and damages described above in paragraphs 17, 22 and 23.

DEMAND FOR TRIAL

Plaintiff hereby demands a trial by jury in this matter as to Defendants Archdiocese, Catholic Bishop, and Order and a bench trial as to Defendant Holy See.

PRAYER

Plaintiff prays for judgment against Defendants, and each of them, for non-economic and economic losses described herein and for Plaintiff's costs and disbursements.

DATED this 31 day of March, 2004.

JEFF ANDERSON & ASSOCIATES, P.A.

By: /s/ Jeffrey R. Anderson
Jeffrey R. Anderson, MSB No. 2057
Attorneys for Plaintiff

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(2)

No. 09-1

Supreme Court, U.S.
FILED
OCT 15 2009
OFFICE OF THE CLERK

In The
Supreme Court of the United States

HOLY SEE,

Petitioner,

versus

JOHN V. DOE,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Whether an employe's actions "within the scope of employment" creating the conditions for the sexual abuse of a child are "tortious acts" under the tort exception to sovereign immunity established by the Foreign Sovereign Immunity Act, 28 U.S.C. § 1605(a)(5) (2006).

Whether state tort law determines whether acts are "tortious acts" that are "within the scope of employment."

PARTIES TO THE PROCEEDINGS BELOW

In addition to the parties identified in the caption, the following entity is a party in the district court but not in the court of appeals: The Order of the Friar Servants of Mary (The Order of the Friar Servants of Mary, U.S.A., Province, Inc.). Former defendant the Catholic Bishop of Chicago, an Illinois corporation sole, was dismissed on July 15, 2004. Former defendant the Archdiocese of Portland in Oregon, an Oregon corporation sole, was dismissed on September 21, 2004.

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The opinion of the court of appeals (Pet. App. 1a-68a) affirming in part and reversing in part the district court's decision is reported at 557 F.3d 1066 (9th Cir. 2009). The opinion of the district court denying the Holy See's facial motion to dismiss for lack of subject matter jurisdiction (Pet. App. 69a-128a) is reported at 434 F. Supp. 2d 925 (D. Or. 2006).

JURISDICTION

The judgment of the court of appeals was entered on March 3, 2009. The Holy See's timely petition for rehearing was denied on March 27, 2009. The court of appeals issued its mandate on April 6, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. §§ 1602-1611 (2006), provides in relevant part as follows:

> Section 1605. General exceptions to the jurisdictional immunity of a foreign state
>
> (a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case –
>
> . . .

> (5) not otherwise encompassed in paragraph (2) above, in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment; except this paragraph shall not apply to –
>
> > (A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused, or
> >
> > (B) any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights[.]

28 U.S.C. § 1605(a)(5).

> Section 1606. Extent of liability
>
> As to any claim for relief with respect to which a foreign state is not entitled to immunity under section 1605 or 1607 of this chapter, the foreign state *shall be liable in the same manner and to the same extent as a private individual under like circumstances*; but a foreign state except for an agency or instrumentality thereof shall not be liable for punitive damages; if, however, in any case wherein death was caused, *the law of the*

> *place where the action or omission occurred provides, or has been construed to provide, for damages only punitive in nature*, the foreign state shall be liable for actual or compensatory damages measured by the pecuniary injuries resulting from such death which were incurred by the persons for whose benefit the action was brought.

28 U.S.C. § 1606 (emphases added).

STATEMENT OF THE CASE

Nature of the Case

This case is about how the Holy See and its agents mishandled Fr. Andrew Ronan, who was a known child sexual predator in the Archdiocese of Benburb, Ireland, and then the all-boys St. Philips High School in Chicago, Illinois, before he sexually abused John V. Doe, the Plaintiff in this case. Although he readily admitted to sexually abusing a boy in the Benburb Archdiocese and to sexually abusing three boys at St. Philips High School, he was then transferred to St. Alban's Church in Portland, Oregon, where he sexually abused John V. Doe, a minor at the time. Fr. Ronan gained John V. Doe's trust through the position and access to children that the Holy See granted him. John V. Doe, as a child, trusted and relied upon the Holy See to nurture and protect him, which led to his trust and admiration for Fr. Ronan. Pet. App. 131a-153a (Amended Complaint,

Doe v. Holy See, 434 F. Supp. 2d 925 (D. Or. 2006) (No. CV 02-430-MO) (filed Apr. 1, 2004)).

Just as it was for John V. Doe, sexual abuse of a child predominantly occurs with the perpetrator having established a relationship with the victim before the abuse. The highest percentage of childhood sexual abuse is perpetrated by family members or other trusted adults. "In sexual assaults of adults, the offender was a stranger in 25% of incidents, a family member in 12%, and an acquaintance in 63%. In contrast, for victims under age 12, the offender was a family member in 47% of incidents, an acquaintance in 49%, and a stranger in just 4%."[1] The perpetrators gain a child victim's trust and acquiescence through the positions they hold, whether it be as a father, mother, grandparent, other relative, teacher, scout leader, or clergy. Thus, abuse in the vast majority of cases does not involve an abduction by "Mr. Stranger Danger" but rather the establishment of a close relationship with grooming of the child over time with the sexual abuse as simply one marker on the

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[1] NATIONAL CENTER FOR JUVENILE JUSTICE, JUVENILE OFFENDERS AND VICTIMS: 1999 NATIONAL REPORT 30 (Sept. 1999), *available at* http://www.ncjrs.gov/html/ojjdp/nationalreport99/toc.html. *See also* OFFICE OF THE GOVERNOR OF IDAHO & OFFICE OF THE ATTORNEY GENERAL OF IDAHO, REPORT TO THE IDAHO LEGISLATURE: PROSECUTION OF CHILD SEXUAL ABUSE 6 (Jan. 2008), *available at* http://www2.state.id.us/ag/sexual_prosecution_reports/2007IdahoProsecutionOfChildSexualAbuseReport.pdf ("46% of the juvenile abusers were acquaintances of their victims, 36% were relatives, and 1.33% was a stranger.").

spectrum of the relationship established by the employee with the child. Unlike sexual assault by a stranger, the sexually predatory act in most cases of child sex abuse is the culmination of many prior acts.

In light of contemporary knowledge of the dynamics of childhood sexual abuse, the Oregon courts have recognized that acts by an employee that are within the "scope of employment" and that culminate in sexual abuse can form the basis of a claim of *respondeat superior*. Therefore, the sexual act itself is not the only act that is relative to determining that a tort has occurred or that *respondeat superior* liability is appropriate. Rather, the behavior with the child that is pursuant to the employment relationship and that leads up to the sexual abuse is actionable in tort, making those acts tortious. *Minnis v. Oregon Mut. Ins. Co.*, 48 P.3d 137, 145 (Or. 2002); *Fearing v. Bucher*, 977 P.2d 1163, 1166 (Or. 1999); *Chesterman v. Barmon*, 753 P.2d 404, 406-07 (Or. 1988).

Oregon Law Regarding What Acts Within the Scope of Employment Establish *Respondeat Superior* Liability

Sexual abuse by trusted adults typically occurs through a complex set of acts over time, not any single act. Oregon law has recognized that actions taken by an employee within the scope of employment in relationship to a child can support a claim of *respondeat superior* liability. While the sexual act

itself may not be within the "scope of employment," *Fearing v. Bucher*, 977 P.2d 1163, 1166 (Or. 1999), other acts associated with and leading up to the abuse plainly within the "scope of employment" are sufficient to establish *respondeat superior* liability for the employer. In other words, the relevant "tortious act" is composed of those actions performed within the scope of employment that established the relationship with the child and created the conditions for the sexual abuse. *Id.* Even more importantly, in a case interpreting the language in *Fearing*, the Oregon Supreme Court elaborated that the intentional tort itself can be a tortious act under the scope of employment. *Minnis v. Oregon Mut. Ins. Co.*, 48 P.3d 137 (Or. 2002).

The court below applied this rule to determine that the acts described in the Amended Complaint were the "tortious acts" within the "scope of employment" that establish *respondeat superior* liability, under Oregon state law and, therefore, satisfy the jurisdictional requirements of 28 U.S.C. § 1605(a)(5) (2006). Pet. App. 34a-35a (*Doe v. Holy See*, 557 F.3d 1066, 1083 (9th Cir. 2009)).

Relevant Proceedings Below

The FSIA codified the principle that while foreign sovereigns generally enjoy immunity from claims by citizens of other states, they should be capable of being brought to justice when their acts are tortious or involve commercial activity. "A foreign state is

normally immune from the jurisdiction of federal and state courts . . . subject to a set of exceptions specified in §§ 1605 and 1607. . . . When one of these or the other specified exceptions applies, 'the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances[.]' " (quoting 28 U.S.C. § 1606). *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 488-89 (1983). Under the FSIA's tort exception, the Holy See is liable for its tortious actions just as any individual actor would be. 28 U.S.C. § 1606 ("[T]he foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances[.]").

The Holy See submitted a motion to dismiss for lack of subject matter jurisdiction in order to avoid its responsibility for the sexual abuse of John V. Doe by Ronan.

The Holy See's motion was denied based on conduct that fell within the tortious act exception to sovereign immunity in the Foreign Sovereign Immunities Act. 28 U.S.C. § 1605(a)(5) (2006). The tortious act exception is designed to capture harms "caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment[.]" 28 U.S.C. § 1605(a)(5). The plain language of the FSIA states that the extent of liability under the act means "the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances[.]" 28 U.S.C.

§ 1606. Because the Oregon Supreme Court has held that "intentional criminal acts of employees" are captured within the *respondeat superior* doctrine "if the acts that lead to the criminal conduct were within the scope of employment," *Fearing v. Bucher*, 977 P.2d 1163, 1166 (Or. 1999), the acts in the case at bar were encompassed by Oregon *respondeat superior* law as to any "private individual" and so "the foreign state shall be liable in the same manner." 28 U.S.C. § 1606.

The district court endorsed the plain language of the FSIA and its purpose of applying the same law to private individuals and foreign states when confronted with like circumstances. The district court held that "'[t]he "scope of employment" provision of the tortious activity exception essentially requires a finding that the doctrine of respondeat superior applies to the tortious acts of individuals.'" *Doe v. Holy See*, 434 F. Supp. 2d 925, 949 (D. Or. 2006) (quoting *Joseph v. Office of Consulate Gen. of Nigeria*, 830 F.2d 1018, 1025 (9th Cir. 1987)). Since there is no cause of action for "scope of employment," the district court examined the meaning of this term within the *respondeat superior* claim and found that Oregon law creates a "theory of 'scope of employment' in which an employer is liable not only for the torts of his employee when the employee is acting within the scope of his employment . . . but also for the intentional criminal acts of employees if the acts that lead to the criminal conduct were within the scope of employment." 434 F. Supp. 2d at 949 (citing *Fearing*, 977 P.2d at 1166.) (internal citation omitted). Thus, the

district court concluded that the tortious act exception applied because, under Oregon law, "plaintiff has sufficiently alleged facts showing that Ronan's conduct preceding the sexual abuse fell within the scope of his employment. Under Oregon law, this is sufficient grounds upon which to hold Ronan's employer liable under a theory of respondeat superior." *Id.* at 950.

The Ninth Circuit, relying on the same precedent as did the district court, agreed that "'the "scope of employment" provision of the tortious activity exception essentially requires a finding that the doctrine of respondeat superior applies to the tortious acts of individuals.' . . . 'This determination is governed by state law.'" *Doe v. Holy See*, 557 F.3d 1066, 1082 (9th Cir. 2009) (quoting *Joseph*, 830 F.2d at 1025 (internal citation omitted)). Contrary to the Holy See's assertion that sexual assault by a priest is *per se* outside the scope of employment, the Ninth Circuit appropriately relied upon the Oregon Supreme Court's clarification of the dictum regarding intentional torts in *Fearing*. *Minnis v. Oregon Mut. Ins. Co.*, 48 P.3d 137, 145 (Or. 2002). The *Minnis* decision read Oregon law to include even the intentional tort within the "scope of employment." *Minnis*, 48 P.3d at 145. The Ninth Circuit observed that "*Minnis* thus makes clear that, rather than holding that sexual abuse is not within the scope of employment, *Fearing* created an alternative test . . . applicable when a plaintiff has alleged an intentional tort: An intentional tort is within the scope of

employment, and can support *respondeat superior* liability for the employer, if conduct that was within the scope of employment was 'a necessary precursor to the' intentional tort and the intentional tort was 'a direct outgrowth of . . . conduct that was within the scope of . . . employment.'" 557 F.3d at 1083 (quoting *Fearing*, 977 P.2d at 1163). The Ninth Circuit concluded that, in short, Doe's "allegations are thus very similar to those in Fearing." *Id.* Applying Oregon law pursuant to the FSIA, the Ninth Circuit held that "Doe has clearly alleged sufficient facts . . . as required to come within the FSIA's tortious act exception. § 1605(a)(5). The Holy See is therefore not immune from Doe's respondeat superior claim." *Id.*

The Ninth Circuit concluded that based upon the Amended Complaint, Doe had sufficiently pled facts for his *respondeat superior* (vicarious liability) claim against the Holy See to proceed. *See* Amended Complaint, *Doe v. Holy See*, 434 F. Supp. 2d 925 (D. Or. 2006) (No. CV 02-430-MO) (filed Apr. 1, 2004).

The decision below was based on the Amended Complaint filed April 1, 2004. Amended Complaint, *Doe v. Holy See*, 434 F. Supp. 2d 925 (D. Or. 2006) (No. CV 02-430-MO) (filed Apr. 1, 2004). It stated: "Plaintiff came to know Ronan as his priest, counselor and spiritual adviser . . . [and] developed great trust, reverence and respect for the Roman Catholic Church and its agents. Thus, Ronan was a person of great influence and persuasion as a holy man and authority figure." Amended Complaint at 6 ¶ 13, *Doe v. Holy*

See, 434 F. Supp. 2d 925 (D. Or. 2006) (No. CV 02-430-MO). The trust formed through the performance of Ronan's spiritual duties as an agent of the Holy See and the Roman Catholic Church enabled Ronan to molest Plaintiff despite the knowledge of his proclivities by his employer. "As a result of these special relationships . . . Plaintiff trusted and relied upon Defendants to nurture and protect him while he was in Defendants [sic] care and custody." *Id.* at 6-7 ¶ 14. Finally, the development of a unique bond between Ronan and Plaintiff in the course of their relationship as pastor and parishioner created the conditions necessary for the sexually predatory behavior to happen. "In late 1965 or early 1966, when Plaintiff was approximately 15 to 16 years old, Ronan, using his position of authority, trust, reverence, and control as a Roman Catholic priest, engaged in harmful sexual contact upon the person of Plaintiff on repeated occasions." *Id.* at 7 ¶ 15.

There is presently a motion pending in the District Court of Oregon to submit a Second Amended Complaint pursuant to Fed. R. Civ. P. 15(a)(2) (2009). *See* Plaintiff's Motion to Amend the Complaint, *Doe v. Holy See*, No. CV 02-430-MO (D. Or., July 15, 2009).

REASONS FOR DENYING THE WRIT

The certiorari petition provides no reason for this Court to review this case, especially at this time. The

decision below was determined by the plain language of the statute and is not in conflict with any decisions of this Court. There is no split in authority among the lower courts regarding what law applies to determine what acts constitute tort liability under the tort exception to sovereign immunity. Secs. 1605 and 1606. Moreover, the case is currently in a procedural posture that counsels against this Court's review.

I. There Is No Split in Authority Regarding Application of the Tort Exception to Sovereign Immunity Under the FSIA

The decision below is not inconsistent with this Court's cases. Nor is there a split in authority regarding the interpretation of the tort exception to sovereign immunity under the FSIA justifying this Court's review. The Petitioner attempts to create the impression of conflict through vague generalizations and dicta drawn from cases not reaching the meaning of "tortious acts" or "scope of employment" in the tort exception and, usually, not reaching any decision involving the tort exception.

A. None of This Court's Cases Cited by the Petitioner Interpret the Tort Exception to Sovereign Immunity – Which Is the Sole Subject of the Petition

The Petition argues that the decision below is inconsistent with this Court's cases interpreting the FSIA. In fact, the cases cited do not even address the

FSIA language at the base of the Petitioner's claims. While each has dicta that can be construed as relevant to the general principles behind the FSIA taken as a whole, none of the cases cited conflicts with, let alone precludes, the Ninth Circuit's holding and interpretation of the tort exception in the FSIA in this case.

The Petition relies heavily on this Court's decision in *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 439 (1989), even though the decision is not on point. This Court in *Amerada* did not reach the question of whether the tort must be within the "scope of employment" of the agent because the injury itself took place 5,000 miles outside the United States and the FSIA's tort exception only applies to "those cases in which the damage to or loss of property occurs *in the United States*." 488 U.S. at 439. Moreover, the Petition cites the House Report stating "Congress' primary purpose in enacting § 1605(a)(5) was to eliminate a foreign state's immunity for traffic accidents and other torts committed in the United States, *for which liability is imposed under domestic tort law*." Cert. Pet. 23 (quoting H.R. Rep. No. 94-1487, at 21) (emphasis added). Liability "imposed under domestic tort law" is determined by state tort law – in this case a vicarious liability claim based on Oregon law – which the Ninth Circuit did in fact apply as it would to any other private entity. Petitioner's citation to *Saudi Arabia v. Nelson*, 507 U.S. 349 (1993), is likewise unavailing. The tortious act exception was not even at issue in

that case – presumably because both the injury and the proximate conduct to Mr. Nelson both occurred outside the United States and would have fallen under *Amerada Hess*.

Petitioner further attempts to manufacture inconsistencies with this Court's cases through reference to *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 620 (1992) (holding that Argentina's unilateral rescheduling of the maturity dates of bonds was a commercial activity with direct effects in the United States under 28 U.S.C. § 1605(a)(2) of the FSIA). *See* Cert. Pet. 18, 20. Once again, however, the Petitioner has relied upon a case that did not interpret the terms of the tort exception.

The Petition also relies upon *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 498 (1983), to suggest that state law should not determine what acts count as "tortious acts" and what is within the "scope of employment." Instead, Petitioner suggests that this Court create out of whole cloth a federal common law definition of these standard tort law terms. Cert. Pet. 22, 24, 26, 28. However, *Verlinden* did not begin to suggest that the tort exception to FSIA be interpreted according to newly crafted common law by this Court. To the contrary, the Court declined to address any of the FSIA exceptions, because the court of appeals had not directly addressed which exception(s) might apply.

Petitioner invokes *First Nat'l City Bank v. Banco Para El Comercio Exterior De Cuba (Bancec)*, 462

U.S. 611, 633-34 (1983), but again, it is a case that is not at odds with the decision below. Cert. Pet. 23, 24, 28. *Bancec* dealt with the question whether a government instrumentality may be held liable under the FSIA for actions that were taken by the sovereign. 462 U.S. at 621. That issue simply is not raised in these proceedings. Finally, the Petition cites *Republic of Austria v. Altmann*, 541 U.S. 677 (2004), for its unremarkable statement that one of the FSIA's purposes is to "clarify [] the rules that judges should apply in resolving sovereign immunity claims." Cert. Pet. 29 (quoting *Altmann*, 541 U.S. at 699). It provides no basis for arguing that the decision in this case was inconsistent with this Court's cases.[2]

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[2] The Petition also relies upon *Republic of Philippines v. Pimental*, 128 S. Ct. 2180, 2190 (2008), but the plaintiffs in that case did not even invoke either the tort or the commercial activity exception. It is also off-point when it attempts to use the "direct effects" language of the commercial activity exception in order to argue for a federal common law interpretation of "scope of employment." Cert. Pet. 18. It is more likely that "direct effects" was addressed exclusively to commercial activity. Congress noted that "commercial activity . . . would include not only a commercial transaction performed and executed in its entirety in the United States, but also a commercial transaction or act having a 'substantial contact' with the United States." H.R. Rep. No. 94-1487, at 17. Congress further noted that "[n]either the term 'direct effect' nor the concept of 'substantial contacts' embodied in section 1603(c) is intended to alter the application of the Sherman Antitrust Act[.]" H.R. Rep. No. 94-1487, at 19. Congress seems to be defining commercial activity based on language in *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 318 (1945). In *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 619 & n.2 (1992), this Court did not reject the suggestion

(Continued on following page)

B. The Petition Cites to No Case in Conflict With the Decision Below, Because Each Case Cited Utilizes the Appropriate State Substantive Law to Determine Whether There Is Liability Under *Respondeat Superior*

The Petition further attempts to create the impression that the decision below is at odds with decisions in courts other than the Supreme Court. Again, there is no such conflict. The principle that state tort law informs the FSIA's tort exception is uncontroversial and widely accepted. *See O'Bryan v. Holy See*, 556 F.3d 361, 383 (6th Cir. 2009) (applying Kentucky *respondeat superior* law to determine whether the tortious act exception of the FSIA applies); *Moran v. Kingdom of Saudi Arabia*, 27 F.3d 169, 173 (5th Cir. 1994) (finding district court's determination that tortious activity exception to immunity did not apply was not a clearly erroneous application of Mississippi law).

The FSIA, or at least its tort exception, 28 U.S.C. § 1605(a)(5), was based upon the FTCA and the decisions with respect to that statute inform similar issues in the FSIA. The Petition, however, fails to note that the reasoning of the court below is consistent with how this Court has read the same

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that the FSIA's "direct effect" requirement embodied *Int'l Shoe*. While *Weltover* found the conduct sufficient under "minimum contacts," the interpretation that "direct effects" is merely defining commercial activity is more sound than the Petitioner's interpretation.

language in the Federal Tort Claims Act, 28 U.S.C. § 1346(b)(1) (2006). It is well-settled that the "scope of employment" inquiry under the FTCA is derived from the *respondeat superior* doctrine which is in turn determined by state law. In *Williams v. United States*, 215 F.2d 800, 810 (9th Cir. 1954), the Ninth Circuit upheld the district court's use of federal common law in defining "scope of employment" for the tort of a U.S. serviceman under the FTCA as "acting in line of (naval) duty." This Court vacated this reasoning in *Williams v. United States*, 350 U.S. 857, 857 (1955), with a two-sentence decision directing lower courts to apply state law to determine the meaning of "scope of employment": "This case is controlled by the California doctrine of respondeat superior. The judgment is vacated and the case is remanded for consideration in the light of that governing principle."

Every circuit to address the issue since *Williams* has applied state law to determine the meaning of "scope of employment." *See Devlin v. United States*, 352 F.3d 525, 532-33 (2d Cir. 2003) ("[*Williams v. United States*] held that the phrase 'while acting within the scope of his office or employment' in section 1346(b) [of the FTCA] is to be given meaning by the law of the relevant state."); *Ross v. Bryan*, 309 F.3d 830, 834 (4th Cir. 2002) (citing *Williams* and applying state law to determine scope of employment); *Primeaux v. United States*, 181 F.3d 876, 878 (8th Cir. 1999) (same); *Bennett v. United States*, 102 F.3d 486, 489 (11th Cir. 1996) (same); *Garcia v.*

United States, 62 F.3d 126, 127 (5th Cir. 1995) (same); *Richman v. Straley*, 48 F.3d 1139, 1145 (10th Cir. 1995) (same); *Flechsig v. United States*, 991 F.2d 300, 302 (6th Cir. 1993) (same); *Pelletier v. Federal Home Loan Bank*, 968 F.2d 865, 876 (9th Cir. 1992) (same); *Duffy v. United States*, 966 F.2d 307, 314 (7th Cir. 1992) (same); *Attallah v. United States*, 955 F.2d 776, 780 (1st Cir. 1992) (same); *Nelson v. United States*, 838 F.2d 1280, 1282 (D.C. Cir. 1988) (same); *McSwain v. United States*, 422 F.2d 1086, 1087-88 (3d Cir. 1970) (same).

Petitioner also relies upon cases that do not even reach FSIA issues. *Moore v. United Kingdom*, 384 F.3d 1079, 1088 (9th Cir. 2004) (failing to reach application of FSIA's tort exception when suit was precluded by NATO status of forces agreement), and cases that indicate that even an intentional tort might be part of the scope of employment. *Tichenor v. Roman Catholic Church*, 32 F.3d 953, 959 n.22 (5th Cir. 1994) (outside FSIA, applying Mississippi law finding employer was not liable for employee's intentional or criminal acts unless employer either authorized or ratified act, but noting, "[i]n some rare instances, an intentional or criminal act could be within the employee's scope of employment."); *Doe v. Liberatore*, 478 F. Supp. 2d 742, 758 (M.D. Pa. 2007) (applying Pennsylvania law in non-FSIA context and determining that rather than *respondeat superior*, negligent retention and supervision were proper causes of action under which Archdiocese might be liable for abusive acts of priest, but noting, "'[i]n

certain circumstances, liability of the employer may also extend to intentional or criminal acts committed by the employee.'" (quoting *Fitzgerald v. McCutcheon*, 410 A.2d 1270, 1271 (Pa. Super. Ct. 1979))).

II. The Procedural Posture of This Case Makes It an Inappropriate Vehicle for This Court's Consideration of the Tort Exception

Following the Ninth Circuit's decision, John V. Doe submitted a motion to submit a Second Amended Complaint with the District Court in this case. Plaintiff's Motion to Amend the Complaint, *Doe v. Holy See*, No. CV 02-430-MO (D. Or., July 15, 2009). If the motion to amend is granted, Petitioner has indicated that it may file a motion to dismiss the Second Amended Complaint on jurisdictional grounds. Holy See's Opp. to Plaintiff's Motion to Amend, *Doe v. Holy See*, No. CV 02-430-MO (D. Or., August 7, 2009). And, therefore, the same issues raised here are likely to be raised again, but on the basis of a more fully elaborated set of facts and allegations.

The District Court has not yet ruled on the motion to submit a Second Amended Complaint. *See* Plaintiff's Motion to Amend the Complaint, *Doe v. Holy See*, No. CV 02-430-MO (D. Or., July 15, 2009) (pending). The court recently granted Petitioner's motion to file a sur-reply in response to the Plaintiff's reply to its opposition to the motion to amend the

complaint. Motion for Leave to File Sur-Reply Regarding Plaintiff's Motion to Amend the Complaint, *Doe v. Holy See*, No. CV 02-430-MO (D. Or., Oct. 7, 2009).

If this Court were to grant the Petition at this time, without being able to take into account the additional allegations of the Second Amended Complaint, it would lead to piecemeal, unnecessary, and costly litigation for both parties.[3]

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[3] Nor should this case be held in light of *Samantar v. Yousuf*, 552 F.3d 371 (4th Cir. 2009), *cert. granted*, ___ S. Ct. ___, 2009 WL 1725968 (Sept. 30, 2009) (U.S. No. 08-1555), which deals with two issues, neither of which are raised in this case. Certiorari was granted in *Samantar* on two issues: First, "[w]hether a foreign state's immunity from suit under the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. § 1604, extends to an individual acting in his official capacity on behalf of a foreign state." Petition for Writ of Certiorari at i, *Samantar v. Yousuf*, No. 08-1555, 2009 WL 1759041 (U.S., June 18, 2009). Second, "[w]hether an individual who is no longer an official of a foreign state at the time suit is filed retains immunity for acts taken in the individual's former capacity as an official acting on behalf of a foreign state." *Id.*

CONCLUSION

For the foregoing reasons, Respondent respectfully requests this Court DENY the petition for certiorari.

Respectfully submitted,

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No. 09-1

Supreme Court, U.S.
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In The
Supreme Court of the United States

HOLY SEE,

Petitioner,

versus

JOHN V. DOE,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

SUPPLEMENTAL BRIEF FOR RESPONDENT

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SUPPLEMENTAL BRIEF FOR RESPONDENT

Pursuant to Sup. Ct. R. 15.8, Respondent submits this brief in response to the Solicitor General's Brief for the United States as Amicus Curiae ("Gov't Br."). The government's brief correctly asserts that this case has none of the elements that would justify a grant of certiorari in this case, and so the petition should be denied.

The government's brief, however, misguidedly recommends that, in the alternative, this Court should grant certiorari in order to vacate the decision of the United States Court of Appeals for the Ninth Circuit for the purpose of re-visiting state law. The government's suggestion rests on a misguided reading of Oregon state law, and is derived from mere dictum in an intermediate appellate Oregon court case. The government's reasoning would mean that the Oregon Supreme Court should have reached an opposite result in its on-point and controlling case, *Fearing v. Bucher*, 997 P.2d 1163, 1166 (Or. 1999). The Petition should be denied.

ARGUMENT

I. The Definition of "Scope of Employment" Is Governed by State Law, and, in this Case, by the Oregon Supreme Court, Which Has Held It Is a Jury Question, Not a Question of Law

It is settled precedent in the Ninth Circuit – and every other circuit to directly address the issue – that state law governs whether acts are "within the scope of employment" under the Foreign Sovereign Immunities Act, 28 U.S.C. § 1605(a)(5). *Randolph v. Budget Rent-a-Car*, 97 F.3d 319, 325 (9th Cir. 1996). *See also O'Bryan v. Holy See*, 556 F.3d 361, 383 (6th Cir. 2009); *Robinson v. Gov't of Malay.*, 269 F.3d 133, 142-145 (2d Cir. 2001); *Moran v. Kingdom of Saudi Arabia*, 27 F.3d 169, 173 (5th Cir. 1994). It is difficult to believe that there is any alternative plausible interpretation given that "scope of employment" is a long-established term under state tort law, and tort law is almost exclusively a matter for the states. *Erie R.R. v. Tompkins*, 304 U.S. 64, 78 (1938). If Congress intended "scope of employment" to be a term of legal art with a distinctive federal meaning, it would have been required to provide such a meaning. *Neder v. United States*, 527 U.S. 1, 21 (1999). It did not. Therefore, the only relevant question before this Court at this time is the most reasonable and

plausible interpretation of Oregon state law governing "scope of employment."[1]

A. The Government Has Misread State Law Governing "Scope of Employment"

The government has twisted Oregon state law almost to the point of being unrecognizable. First, the government treats the question whether sexual abuse can be within the scope of employment for superior respondeat liability as a matter of law. According to the government, "the alleged sexual abuse in this case did not fall within the scope of employment as a matter of Oregon law." Gov't Br. at 13. This is, in fact, a mischaracterization of the Oregon Supreme Court's precedents.

The most plausible and reasonable reading of Oregon Supreme Court cases is that whether an employee has acted within the "scope of employment" in cases involving sex abuse is a question of fact for the jury – not a question of law. While sexual assault or abuse *by itself* may not be within the scope of employment, sexual assault arising out of and interrelated with the employee's duties, actions, and

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[1] As the government correctly states, there are two additional reasons that this issue is not debatable: (1) Petitioner did not challenge this aspect of the decision below, and (2) the Supreme Court has followed the same interpretation with respect to the same language in the Federal Tort Claims Act. Gov't Br. at 9, n.5 (citing to *Williams v. United States*, 350 U.S. 857 (1955) (per curiam)).

intent to serve the master may well fall within the scope of employment. *Chesterman v. Barmon*, 753 P.2d 404, 406 (Or. 1988). If acts clearly within the scope of employment are interrelated with and necessarily cause the abuse, the abuse can be considered by the jury as occurring within the scope of employment (along with all the other relevant acts taken in the scope of employment) for purposes of determining respondeat superior liability. *Fearing*, 997 P.2d at 1166.[2] The Oregon test does not permit employer liability simply because the employment relationship brings the employee and the victim together. To the contrary, the abuse must necessarily be linked to the employee's role, obligations, and service to the employer in such a way that a jury can infer that the acts of abuse are inseparable from the sexual aggressor's role as an employee. In that circumstance, the abuse can be one of the facts that satisfies the core element of proof that the employee was acting "within the scope of employment" in that case and, therefore, the employer is liable for those acts. *Minnis v. Oregon Mut. Ins. Co.*, 986 P.2d 77, 83

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[2] Oregon is not alone in treating "scope of employment" as a question of fact for the jury. *See Martinelli v. Bridgeport Roman Catholic Diocesan Corp.*, 989 F.Supp. 110, 118 (D. Conn. 1997); *Garriepy v. Ballou & Nagle*, 157 A. 535, 537 (Conn. 1931); *Alma W. v. Oakland Unified School Dist.*, 176 Cal. Rptr. 287, 289 (Cal. Ct. App. 1981); *Tall ex rel. Tall v. Board of Sch. Comm'rs*, 706 A.2d 659, 668 (Md. Ct. Spec. App. 1998); *Fahrendorff ex rel. Fahrendorff v. North Homes, Inc.*, 597 N.W.2d 905, 910 (Minn. 1999); *Doe v. Bruton Parish Church*, 42 Va. Cir. 467, 477 (Va. Cir. Ct. 1997); *Gilliam v. DSHS*, 950 P.2d 20, 28 (Wash. Ct. App. 1998).

(Or. Ct. App. 1999). If the government were correct, *Fearing* would have been decided differently.

Second, the government manufactures new Oregon law by trying to extract "scope of employment" from a theory of respondeat superior liability. There is no such thing. "Respondeat superior" means, literally, "let the superior make answer," Black's Law Dictionary 1313 (7th ed. 1999), or, that the employer is liable for harm to the victim, *because* the employee's actions occurred under the umbrella of the employer.

According to the government, Oregon has created a "new tort" of vicarious liability for which the triggering acts need not be in the scope of employment. Gov't Br. at 15-16. This reading cannot be supported by the discussion in *Fearing* or its outcome. Moreover, under long-settled tort law, it would be nonsensical to consider respondeat superior liability without proof of acts within the scope of employment, so the government's attempt to sever the two is absurd.

Even if the government's reading were correct that the sex act itself is *never* within the scope of employment, the government's conclusion that the defendant employer would then be absolved of liability for sexual abuse because there are no tortious acts within the scope of employment that can trigger liability is patently wrong.

The Oregon Supreme Court's obvious reasoning is that acts necessarily leading up to the abuse are

part of the set of facts establishing that the employee committed a tort within the "scope of employment." Therefore, the employer is vicariously liable for the abuse. *See, e.g.*, *Fearing*, 997 P.2d at 1168; *Minnis*, 986 P.2d at 83. In other words, the grooming and the attempts to gain the trust of the child and family, using the position created by the employer, are sufficient tortious acts "within the scope of employment" to create vicarious liability for sex abuse.[3]

This means that the plaintiff is permitted to go forward in a sex abuse case under Oregon law based on acts other than the sex act within the scope of employment. There is no question that the Amended Complaint describes those acts. Am. Compl. ¶¶ 13-14.

Third, the government rests its recommendation to grant certiorari for the purpose of vacating the court of appeals' decision on the slender reed of a state intermediate appellate decision. According to the government, this lower court opinion holds that, as a matter of law, sexual abuse may never be within the scope of employment. However, this is not what the Oregon Supreme Court has held, and "the State's highest court is the best authority on its own law." *C.I.R. v. Bosch's Estate*, 387 U.S. 456, 465 (1967).

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[3] The government apparently believes that the tort of sexual abuse is a one-event tort. That would be contrary to the copious studies and the views of the experts on the subject. *See*, Kenneth V. Lanning, Former Supervisory Special Agent, FBI, *Child Molesters: A Behavioral Analysis* 37 (4th ed. 2001) *available at* http://www.cybertipline.com/en_US/publications/NC70.pdf.

As discussed above, the *Fearing* case treats the question of whether the acts of abuse are within the scope of employment as a fact question for the jury, not a question of law. *Fearing*, 977 P.2d at 1168. The governing question under Oregon law is whether the abuse is directly tied into the employee's actions and intent to serve the employer. *Fearing*, 997 P.2d at 1166. If that question can be answered in the affirmative, a jury can find that those acts, along with the employee's other relevant acts, are within the scope of employment and, therefore, vicarious liability attaches for sexual abuse.

Archdiocese of Portland, 180 P.3d 160 (Or. Ct. App. 2008), *rev'd on other grounds*, *Schmidt v. Mt. Angel Abbey*, 223 P.3d 399 (Or. 2009), on which the government relies, also provides a particularly weak justification for vacating the Court of Appeals, because the Oregon Supreme Court reversed *Schmidt* on other grounds and did not take up the *Schmidt* court's reasoning with respect to "scope of employment." In fact, the Oregon Supreme Court expressly refused to reach the "scope of employment" issue: "We limited our review of the Court of Appeals decision to the statute of limitations issue, *ORAP 9.20(2)*, and therefore express no opinion as to the respondeat superior issue." *Schmidt*, 223 P.3d 399, 402 n.1 (Or. 2009).

In any event, the meaning of state law is determined by state supreme court precedent, not by intermediate courts. *C.I.R. v. Bosch's Estate*, 387 U.S. at 465. And when the state law is fairly disputed by the parties, the state supreme court is the only

appropriate body to clarify the issue. *Employment Div. v. Smith*, 485 U.S. 660 (1988) (remanding case to Oregon Supreme Court for clarification of law, where interpretation was disputed by the parties). That means the controlling decision is *Fearing*, as the Court of Appeals for the Ninth Circuit correctly held.

II. The Government's Reasoning Is Inconsistent with Other Provisions and the Legislative History of the FSIA

The FSIA was intended to de-politicize these cases and to take the State Department out of the calculus. Congress could not have been more explicit that it is inappropriate for the executive branch to attempt to alter governing law in order to reach a particular end in tort or commercial cases. Accordingly, the exceptions in FSIA were intended to shield victims from both the vagaries of politics and pressure from foreign sovereigns. The government's far-fetched reading of Oregon law appears to cross that line.[4]

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[4] The executive branch could be more appropriately involved with these issues if it were to take efforts to protect the interests of United States children by initiating investigations, following the lead of Ireland and Germany. *See* Commission to Inquire into Child Abuse, Commission Report (2009), http://www.childabusecommission.com/rpt/; Yvonne Murphy, et al., Commission of Investigation: Report into The Catholic Archdiocese of Dublin (2009), http://www.dacoi.ie/; Francis D. Murphy, et al., The Ferns Report (2005), http://www.bishop-accountability.org/ferns/; Verena Schmitt-Roschmann, *Pope's Former Diocese*

(Continued on following page)

Section 1606 states that "the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. § 1606 (2009). Yet, under the government's reasoning, a private organization that creates an employment environment that induces child sex abuse in Oregon is liable for the sex abuse of the child, while a sovereign that engages in identical behavior and causes the same harm is not. This is contrary to Congress's intent.

The legislative history states that the FSIA was enacted to protect American citizens from harm generated by the acts of sovereign employees, officials, and agents in the United States. FSIA also was supposed to end the practice of having sovereigns pressure the State Department to avoid accountability to American citizens for torts and commercial obligations. It is axiomatic that under the FSIA, American citizens like John V. Doe, who are harmed by the employment practices of sovereigns, like the Holy See, should be permitted to go into United States courts in order to obtain redress for the harm done to them.

As the House Report explained, under the law before FSIA:

Faces 'Tsunami' Of Abuse Allegations, HUFF. POST, Mar. 19, 2010, http://www.huffingtonpost.com/2010/03/19/germany-abuse-munich-dioc_n_505601.html (discussing government task force addressing abuse by Catholic clergy).

> A private party who deals with a foreign government entity cannot be certain that his legal dispute with a foreign state will not be decided on the basis of non-legal considerations through the foreign government's intercession with the Department of State.

(H.R. Rep. No. 94-1487, pt. 9, at 1 (1976)). The FSIA was intended to change the balance so that American victims could obtain justice when sovereigns harmed them:

> A principal purpose of this bill is to transfer the determination of sovereign immunity from the executive branch to the judicial branch, thereby reducing the foreign policy implications of immunity determinations and assuring litigants that these often crucial decisions are made on purely legal grounds and under procedures that insure due process. The Department of State would be freed from pressures from foreign governments to recognize their immunity from suit and from any adverse consequences resulting from an unwillingness of the Department to support that immunity. As was brought out in the hearings on the bill, U.S. immunity practice would conform to the practice in virtually every other country – where sovereign immunity decisions are made exclusively by the courts and not by a foreign affairs agency.

Id., pt. 7 at 5. Accordingly, John V. Doe asks for nothing more than the rule of law pursuant to a fair reading of governing state law.

III. The Government's Reasoning Appears to Suffer from a Deficient Understanding of the Phenomenon of Child Sex Abuse within Organizations

Child sex abuse by an employee may be wholly independent of employment in some, and even most, circumstances, but there are times when an employer or organization can operate in a way that makes the abuse virtually inevitable. The Centers for Disease Control and Prevention have studied the issue. Janet Saul, Ph.D. & Natalie Audage, M.P.H., *Preventing Child Sex Abuse within Youth Organizations: Getting Started on Policies and Procedures*, Centers for Disease Control and Prevention, National Center for Injury Prevention and Control, U.S. Dep't of H.H.S. at 18 (2007), *available at* http://www.cdc.gov/ncipc/dvp/preventingchildsexualabuse.pdf. Prosecutors have as well. Report of the Grand Jury of the Court of Common Pleas First Judicial District of Pennsylvania, Criminal Trial Division, Phil. Grand Jury Rep. Misc. No. 03-00-239, § 1, at 1 (2003), *available at* http://www.philadelphiadistrictattorney.com/images/Grand_Jury_Report.pdf.

Courts in Oregon are intended to provide redress to children harmed in organizations as a result of the organization's policy failures. *See, e.g.*, Special Verdict, *Lewis v. Boy Scouts of America, et al.*, No. 0710-11294 (Or. 4th Dist. Cir. Ct., Apr. 13, 2010) (jury awards punitive damages against Boy Scouts organization for mishandling child sex abuse claims for decades).

The *Fearing* rule speaks to the reality of organizational mishandling of child safety. *Fearing v. Bucher*, 997 P.2d 1163, 1166 (Or. 1999). By failing to pay adequate attention to the facts of this case, the government elides this essential element of the case. Here are the facts, which the government's brief glosses over: Father Andrew Ronan used his priestly position to abuse children in a parish in Benburb, Ireland (Am. Compl. ¶ 11); he admitted to abusing the children (Am. Compl. ¶ 11); he was transferred to Chicago and placed in a school, where he also admitted to abusing children and wondered aloud why the Church kept putting him in assignments with access to children (Am. Compl. ¶ 12); and then he was transferred to Oregon and placed in a parish where, once again, dealing with children was integral to his employment. That is where he abused John V. Doe (Am. Compl. ¶¶ 13-15). Under Oregon law, there is no question that a jury should be permitted to hear this evidence and to decide whether, as a matter of fact, the abuse was part and parcel of Ronan's acts within the "scope of employment" for the Holy See.

The Oregon rule that treats "scope of employment" in abuse cases as a question of fact for the jury reflects the compelling interest in protecting children from child sex abuse. Although, generally, sexual abuse is not likely to be "within the scope of employment," the Oregon Supreme Court recognizes such a possibility. Like all good tort rules involving children, it is a deterrent to harm and an incentive to protect. Without it, organizations can ignore the

needs of children and escape accountability when they do not. There is no legitimate reason to distort Oregon Supreme Court cases and the FSIA to make an exception for any sovereign that endangers United States children.[5]

CONCLUSION

The government is correct that there is no reason for this Court to take this case on the merits. The government's novel and strained interpretation of Oregon cases is untenable and unreasonable. Therefore, its suggestion to grant certiorari for the purpose of vacating the decision below is unsound.

[5] As the government notes, the question of jurisdiction under the commercial activity exception is not before this Court at this time and remains pending in the courts below. Gov't Br. 6 n.3.

For the foregoing reasons, Respondent respectfully requests this Court DENY the petition for certiorari.

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INTRODUCTION

As the amicus brief of the United States makes clear, the Ninth Circuit erred in denying immunity in the decision below. The consequences of that error are stark. Absent this Court's intervention, a foreign sovereign clearly entitled to immunity will be subjected to the burdens of litigation in a district court lacking subject matter jurisdiction.

Based upon the clear merits of the Holy See's petition and the implications of the Ninth Circuit's decision, the Court should grant plenary review. In the alternative, this Court should, consistent with the United States' recommendation, enter a summary disposition granting petitioner relief. But in all events, given the Executive Branch's recognition that the Ninth Circuit incorrectly denied immunity to the Holy See, it would be unthinkable to let that decision stand and impose the very burdens upon a foreign sovereign that the FSIA is intended to avoid.

I. The United States and the Holy See Agree on the Merits of the Holy See's Petition and the Implications of the Ninth Circuit's Decision

On November 16, 2009, this Court invited the Solicitor General to express the views of the United States with regard to the Holy See's petition for writ of certiorari. The response is clear: the United States is in agreement with the merits of the Holy See's petition and the implications of the Ninth Circuit's decision.

In particular, the United States and the Holy See agree that:

- The Ninth Circuit committed clear legal error. (Brief for the United States as Amicus Curiae ("SG Br.") 20; Pet., *passim*).

- The Ninth Circuit's decision violated the FSIA's plain text. (SG Br. 19, 20; Pet. 11-15, 17).

- The Ninth Circuit's decision is in tension with this Court's FSIA precedent "instructing that courts should not expand the FSIA's exceptions . . . beyond the boundaries set by Congress." (SG Br. 18-19; Pet. 18-21).

- The Ninth Circuit's disregard for the FSIA's plain language raises foreign relations and reciprocity concerns. (SG Br. 20; Pet. 16-17, 26 n.7; Reply Br. 9-10).

- The Ninth Circuit's decision is contrary to FTCA precedent, including *Primeaux v. United States*, 181 F.3d 876 (8th Cir. 1999) (en banc). (SG Br. 16; Pet. 26-27).

- The Ninth Circuit's decision directly conflicts with holdings of the Oregon Supreme Court and the Oregon Court of Appeals. (SG Br. 10-13; Pet. 13 n.4).

- The Holy See is immune from respondent's vicarious liability claim. (SG Br. 13, 16-17; Pet. 1, 15).

- The district court lacks subject matter jurisdiction over respondent's vicarious liability claim. (SG Br. 7, 13; Pet. 1, 15).

As set forth below, all of these factors weigh heavily in favor of relief for the Holy See.

II. Based Upon the Errors in the Ninth Circuit's Analysis Identified by the Holy See and the United States, this Court Should Grant Plenary Review

After detailing the Ninth Circuit's errors, SG Br. 8-17, the Solicitor General suggests that the Holy See's petition does not satisfy this Court's criteria for plenary review. With all due respect, the Solicitor General is applying a standard that is contrary to this Court's practice and that undervalues the interests of a foreign sovereign wrongly denied immunity. Given the errors identified in the Petition and in the Solicitor General's brief, the standard for plenary review is plainly met.

A. Plenary Review Should be Granted Because the Ninth Circuit's Decision Violated the FSIA's Plain Text and is in Tension with this Court's FSIA Precedent

It is the common view of the United States and the Holy See that the Ninth Circuit's decision permits "jurisdiction over a claim that falls outside the bounds established by the [FSIA tort] exception's *plain text*: a claim based on tortious conduct that was not committed within the scope of employment." SG Br. 19 (emphasis added); *see also id.* at 20. The United States also agrees that the Ninth Circuit's decision "might be

regarded as in tension with this Court's decisions instructing that courts should not expand the FSIA's exceptions to foreign sovereign immunity beyond the boundaries set by Congress." *Id.* at 18-19.

This Court's FSIA precedent underscores a fundamental principle: the FSIA's exceptions should not be expanded by courts beyond the boundaries set by the political branches. Pet. 18-21; SG Br. 18-19.[1] Now that the Executive Branch has confirmed that the Ninth Circuit expanded the tort exception beyond its text, there is no basis to allow that decision to stand. As this Court's grant of certiorari in *Amerada Hess* demonstrates, plenary review is appropriate where a court of appeals' decision disregards the FSIA's plain language, even in the absence of a circuit split. Such an approach reflects the reality that the improper denial of immunity to a foreign sovereign is no small matter, but rather is just the kind of "compelling reason" for plenary review that Rule 10 describes. *See* Supreme Court Rule 10; *see also* Eugene Gressman et al., *Supreme Court Practice* 270 (9th ed. 2007) ("Gressman") ("Significant federal statutory questions implicating foreign affairs may give rise to review on certiorari.").[2]

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[1] Given that the FSIA raises sensitive foreign relations issues, adherence to the terms prescribed by the political branches is critical. *Cf.* Weber, *The Foreign Sovereign Immunities Act of 1976: Its Origin, Meaning and Effect*, 3 YALE STUDIES IN WORLD PUBLIC ORDER 1, 8 (1976) (stating that this Court's pre-FSIA precedent "firmly settled" the "plenary power of the political branches to prescribe national standards against which claims to immunity would be judged").

[2] This Court has in other contexts granted certiorari where a petition raises a significant issue of federal statutory interpretation. See, *e.g.*, *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 56-58 (2004). And contrary to the United States'

The Ninth Circuit's disregard of the FSIA's plain text and of this Court's precedent requiring strict adherence to the FSIA's language are reasons enough for the Court to grant plenary review. However, in this case, there is also a split in the Circuits on nearly identical facts.

B. Plenary Review Should be Granted Because the Ninth Circuit's Decision Conflicts with the Sixth Circuit's *O'Bryan* Decision

There is a clear conflict in results between the Ninth Circuit's decision and the Sixth Circuit's decision in *O'Bryan v. Holy See*. *See* Reply Br. 7.

Under the tort exception, the tortious act itself must be within the scope of employment. 28 U.S.C. 1605(a)(5); SG Br. 14-15. Sexual abuse of a minor by a priest is outside the scope of employment under both Oregon and Kentucky law. SG Br. 10-13, 17. Accordingly, when properly applying federal and state law, neither the Ninth Circuit nor the Sixth Circuit should have found jurisdiction – and yet the Ninth Circuit did and the Sixth Circuit did not. That conflict in circuit cases, involving the same sovereign and identical facts, merits the Court's review. Pet. 29; Reply Br. 5-8.

To the extent that the difference in result may have been the product of the Ninth Circuit's errors in

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argument (SG Br. 19), tension with this Court's precedent on an important issue is a sufficient basis to grant plenary review. *Rainey v. Chever*, 527 U.S. 1044, 119 S. Ct. 2411, 2414 (1999) (Thomas, J., dissenting).

construing *both* state and federal law, that hardly lessens the case for plenary review. The Ninth Circuit's mistaken interpretation of the FSIA – a purely federal question – was a but-for cause of its error and the difference in result from the Sixth Circuit's decision in *O'Bryan*. The Court recently granted certiorari in analogous circumstances in a commercial context. *See AT&T Mobility LLC v. Concepcion*, No. 09-893 (*cert. granted* May 24, 2010). Certainly, plenary review is even more appropriate in the context of a mistaken rejection of a foreign state's sovereign immunity.

C. Plenary Review Should be Granted Because the Ninth Circuit's Decision is Contrary to FTCA Precedent

Under the FTCA, a state vicarious liability rule cannot be used to expand jurisdiction over the United States where the wrongful act itself is not within the scope of employment. SG Br. 16 (citing *Primeaux*, 181 F.3d at 878); *see also* Pet. 26-28; Reply Br. 4-5. Although the Ninth Circuit's decision is directly contrary to the Eighth Circuit's en banc decision in *Primeaux* and other FTCA precedent, the United States argues that plenary review is unwarranted "[b]ecause the decision below concerns only the FSIA" and therefore "does not squarely conflict with any decision on the FTCA." SG Br. 18 n.11.

The FSIA's tort exception was modeled on the FTCA (SG Br. 2 n.1; Reply Br. 8-9), and the FTCA's "scope of employment" language is identical to that found in the FSIA. *Compare* 28 U.S.C. 1346(b)(1) *with* 28 U.S.C. 1605(a)(5). This Court has repeatedly granted certiorari to resolve conflicting interpretations

of different but related statutory schemes. *See, e.g.*, *Gutierrez v. Ada*, 528 U.S. 250, 254 (2000) (certiorari granted "to resolve a split between the Ninth Circuit's interpretation of the Organic Act of Guam and the Third Circuit's reading of identical language in the Revised Organic Act of the Virgin Islands"); *see also* Gressman 242 ("[C]ourts of appeals may have construed related but not identical statutes differently. If sufficiently clear, such conflicts may move the Court to grant certiorari, especially if the case is otherwise important.").

The United States' belief that conflict with FTCA precedent is insufficient is also inconsistent with comity, reciprocity and equality principles. *Republic of Philippines v. Pimentel*, 553 U.S. 851, 128 S. Ct. 2180, 2190 (2008); Reply Br. 8-11. When the United States faced FTCA panel decisions in *Primeaux* that diminished its immunity through reasoning directly analogous to the Ninth Circuit's FSIA decision below, the United States argued forcefully in its petition for en banc review that the issue was of "exceptional importance" and clearly merited further review. The United States contended that "[i]f left unreviewed, the [*Primeaux*] panel decisions . . . could cause plaintiffs nationwide to challenge the significance, or even the existence, of the 'scope' requirement in 28 U.S.C. 1346(b)(1)." The United States also argued that "[i]f allowed to stand, this decision will, in all likelihood, cause a cloud of uncertainty to envelop a previously clear statutory requirement, with [far-reaching] ramifications." What was true of the FTCA and the United States' sovereign immunity in *Primeaux* is equally true of the FSIA and the interests of foreign sovereigns. There is no reason to allow the decision below to cloud the previously clear immunity

provisions of the FSIA. Given the close relationship between the two statutes, and principles of comity, reciprocity and equality, the arguments the United States made in *Primeaux* support review here. Pet. 26 n.7; Reply Br. 8-9.

III. If this Court Does Not Grant Plenary Review, the Court Should Summarily Dispose of the Case to Vindicate the Immunity of a Foreign Sovereign

In the view of the United States, this Court should grant the Holy See's certiorari petition, vacate the court of appeals' judgment, and remand for further consideration ("GVR"). SG Br. 19-21. The United States believes that the GVR should correct the Ninth Circuit's mistaken interpretation of the FSIA and make clear "that Section 1605(a)(5) authorizes suit against a foreign state for a tort by the state's employee only if the tort itself was committed by the employee while acting within the scope of his office or employment." SG Br. 21. The United States recommends that the matter should be remanded "in light of that ruling on the interpretation of the FSIA and also in light of the decision of the Oregon Court of Appeals in *Schmidt* concluding (based on *Fearing*) that sexual abuse is not within the scope of a priest's employment." *Id.*

While the Holy See appreciates what the United States is seeking to accomplish through its GVR recommendation, a summary reversal may be more

appropriate for several reasons.[3] First, the Ninth Circuit clearly erred on an important issue of FSIA interpretation. SG Br. 19-20. The option of summary reversal exists precisely to correct such clear errors, Gressman 251, and the United States' brief itself provides a roadmap for an opinion summarily reversing the decision below. Second, while the United States argues that the Court should GVR in light of *Schmidt*, the Ninth Circuit was apprised of *Schmidt* on rehearing – and it is therefore unclear whether *Schmidt* would make a difference in any further consideration of the case by the Ninth Circuit. Finally, the Solicitor General points to this Court's GVR in *Ministry of Def. v. Elahi*, 546 U.S. 450, 453 (2006), as precedent for a GVR here. While *Elahi* shows that the Court has authority to issue the kind of GVR the Solicitor General envisions, the GVR in *Elahi* did not prevent the Ninth Circuit from erring on remand or obviate the need for this Court ultimately to grant plenary review. *See Ministry of Def. v. Elahi*, No. 07-615 (*cert. granted* June 23, 2008). As the United States recognizes, a central purpose of foreign sovereign immunity is to avoid burdens of litigation. SG Br. 19-20. A summary reversal would avoid unnecessary proceedings in the Ninth Circuit, a fitting result where, as here, the Executive Branch recognizes that the sovereign is clearly immune from the sole remaining claim in this 8-year old case. SG Br. 13, 16-17.

[3] It is worth noting that the Solicitor General's proposal – which calls for the Court to "correct" the errors of the Ninth Circuit (SG Br. 21) – already appears to resemble a summary reversal more than a GVR.

In light of the Ninth Circuit's clear error and the sovereign interests in play, this Court should summarily reverse the court of appeals' decision if plenary review is not granted.

IV. Given that the Holy See is Immune From Respondent's Sole Remaining Claim and that the District Court Lacks Subject Matter Jurisdiction, Denial of the Petition is Not a Viable Option

The United States recognizes that the Holy See is immune from respondent's sole remaining claim and that the district court lacks subject matter jurisdiction. Given the United States' view, and in light of basic principles of comity, denial of the petition is not a viable option.

The "central purpose" of foreign sovereign immunity is to protect a sovereign from the burdens of litigation. SG Br. 19-20; *see also Kelly v. Syria Shell Petroleum Dev. B.V.*, 213 F.3d 841, 849 (5th Cir. 2000). The Holy See faces extensive discovery if the case proceeds in the district court. SG Br. 20 n.12.[4] To compel the foreign sovereign "to engage in the burdens and costs of responding to discovery, especially when

[4] There is every indication that discovery litigation in this matter would be complex, expensive and burdensome. For example, before the matter was stayed by the district court pending proceedings in this Court, Plaintiff served the Holy See with wide-ranging discovery, including requests seeking, *inter alia*, documents and testimony "regarding the Holy See's, including the Pope's, authority over Roman Catholic Priests." While such requests are clearly subject to objections, litigation over the validity and scope of those objections is itself certain to impose significant burdens upon the sovereign.

the jurisdictional question . . . may be resolved simply by reference to the undisputed allegations in the complaint, would frustrate the significance and benefit of entitlement to immunity from suit under the FSIA." *Butler v. Sukhoi Co.*, 579 F.3d 1307, 1315 (11th Cir. 2009) (quotation marks omitted); *see also, e.g.*, *Siegert v. Gilley*, 500 U.S. 226, 232 (1991) ("[U]ntil this threshold immunity question is resolved, discovery should not be allowed."). Given the Holy See's clear immunity from respondent's sole remaining claim, as confirmed by the brief of the United States, the Court should grant relief to prevent proceedings that would unnecessarily undermine the protection afforded by the FSIA.

Denial of the petition would also effectively return this matter to a district court that lacks subject matter jurisdiction. SG Br. 13; 28 U.S.C. 1330(a). It is well-settled that "[w]ithout jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause.'" *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998) (quoting *Ex parte McCardle*, 7 Wall. 506, 514 (1868)); *cf.* FED. R. CIV. P. 12(h)(3) ("If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action."). Because the district court is without subject matter jurisdiction over respondent's sole remaining claim, further litigation should not be permitted to proceed in that court.

CONCLUSION

For the reasons set forth above and in the Holy See's petition, this Court should grant plenary review.

If the Court is not inclined to grant plenary review, the Court should enter a summary disposition granting petitioner relief. In any event, in light of the United States' agreement with the merits of the Holy See's petition, one disposition is clearly improper: the district court case against the Holy See should not be allowed to proceed when the sovereign is immune and the lower court is without jurisdiction.

Respectfully submitted,

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HOLY SEE,
Petitioner,
v.
JOHN V. DOE,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S REPLY BRIEF

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INTRODUCTION

Contrary to Respondent's argument in the brief in opposition, the Ninth Circuit's decision conflicts with prior holdings of this Court and circuit courts on four major issues: the use of precursor conduct to find jurisdiction under the FSIA, the use of a "direct outgrowth" theory to confer jurisdiction under the tort exception, the stripping of immunity in the absence of a jurisdictionally-significant act attributable to the foreign sovereign, and the reliance on state liability rules contrary to the FSIA's federal jurisdictional requirements.

Respondent's brief also ignores that the Ninth Circuit's decision undermines basic principles undergirding foreign sovereign immunity, including uniformity, comity, equality and reciprocity.

Because the Ninth Circuit's decision creates multiple conflicts and undermines core principles of foreign sovereign immunity, certiorari should be granted. In the alternative, given the nature of the issues and the foreign policy implications of this case, the Court should request the views of the Solicitor General and then grant the petition.

I. CONTRARY TO RESPONDENT'S ASSERTION, THE NINTH CIRCUIT'S DECISION CREATES A NUMBER OF CONFLICTS

a. Use of Precursor Conduct Under the FSIA: Respondent concedes that the Ninth Circuit relied on precursor conduct occurring within the scope of employment to find jurisdiction over Respondent's

vicarious liability claim under the FSIA's tort exception. Brief in Opposition ("Opp.") 10-11. The Ninth Circuit's decision to base FSIA jurisdiction on conduct occurring before the jurisdictionally-significant act is contrary to the holdings of this Court and the circuit courts. *See Saudi Arabia v. Nelson*, 507 U.S. 349, 358 (1993) (rejecting theory of jurisdiction based upon "activities that preceded [the torts'] commission"); *see also id.* at 363; *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 618 (1992) (rejecting "unexpressed" jurisdictional requirements under the FSIA);[1] *Gerding v. Republic of France*, 943 F.2d 521, 527 (4th Cir. 1991); *Zedan v. Kingdom of Saudi Arabia*, 849 F.2d 1511, 1513 (D.C. Cir. 1988); *Asociacion de Reclamantes v. United Mexican States*, 735 F.2d 1517, 1524-25 (D.C. Cir. 1984); Petition for a Writ of Certiorari ("Pet.") 19-20.

b. **Use of "Direct Outgrowth" Theory Under Tort Exception:** Respondent also acknowledges that the Ninth Circuit relied upon a "direct outgrowth" theory of jurisdiction. Opp. 10-11. The Ninth Circuit's "direct outgrowth" approach conflicts with *Amerada Hess* and circuit precedent. *See Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 441 (1989) (rejecting "direct effect" approach under tort exception); *Persinger v. Islamic Republic of Iran*, 729 F.2d 835, 843 (D.C. Cir. 1984); *see also Weltover*, 504 U.S. at 618; Pet. 18-19.

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[1] While *Nelson*, *Weltover* and *Amerada Hess* each obviously involved their own set of facts, Opp. 13-14, Respondent never explains how the Ninth Circuit's decision is consistent with the principles set forth in this Court's prior holdings.

c. **Absence of Jurisdictionally-Significant Attributable Act:** By finding jurisdiction notwithstanding that the tortious act itself fell outside the scope of employment, the Ninth Circuit's opinion conflicts with precedent requiring jurisdictionally-significant acts to be attributable to the foreign sovereign itself. *Cf.*, *e.g.*, *Dale v. Colagiovanni*, 443 F.3d 425, 429 (5th Cir. 2006); *Velasco v. Gov't of Indonesia*, 370 F.3d 392, 400 (4th Cir. 2004); *Zappia Middle E. Const. Co. v. Emirate of Abu Dhabi*, 215 F.3d 247, 252 (2d Cir. 2000); Pet. 15-16.[2]

d. **Use of State Law as Against Contrary Federal Jurisdictional Requirements:** The Ninth Circuit's unbridled use of state liability rules is inconsistent with FSIA precedent, where circuit courts have applied state law without exceeding the parameters of the federal jurisdictional statute. *See*, *e.g.*, *O'Bryan v. Holy See*, 556 F.3d 361, 385 (6th Cir. 2009), *cert. denied*, 77 U.S.L.W. 3645 (U.S. Oct. 5, 2009) (No. 08-1384) (holding that the tortious act of

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[2] The tortious act of sexual abuse is "clearly" outside the scope of a priest's employment. *Fearing v. Bucher*, 977 P.2d 1163, 1166 (Or. 1999); Pet. 12-13; *see also* Opp. 5-6 (conceding that "the sexual act itself may not be within the 'scope of employment[]'" under Oregon law). Nothing in *Minnis* – wherein the court and the parties all *agreed* that the sexual assault was outside the scope of employment – suggests otherwise. *Minnis v. Oregon Mut. Ins. Co.*, 48 P.3d 137, 143 (Or. 2002); Pet. 13 n.4; Opp. 9-10. Moreover, Ronan's conduct of acting as Respondent's "priest, counselor and spiritual adviser" (Pet. App. 34a) was not "tortious," Opp. 11, since it could not have subjected Ronan to liability. RESTATEMENT (SECOND) OF TORTS § 6 (1965); *see also Schmidt v. Archdiocese of Portland*, 180 P.3d 160, 178 (Or. App. 2008) (vicarious liability under Oregon law "based on an employee's actions . . . *preceding his tortious conduct*") (emphasis added).

sexual abuse fell outside the tort exception's scope-of-employment requirement under Kentucky law); *Moran v. Kingdom of Saudi Arabia*, 27 F.3d 169, 173-74 (5th Cir. 1994) (holding that negligent driving during trip taken for personal reasons fell outside the tort exception's scope-of-employment requirement under Mississippi law); *Robinson v. Gov't of Malaysia*, 269 F.3d 133, 142-46 (2d Cir. 2001) (determining that state law claims do not satisfy tort exception's "tortious act or omission" requirement).

FTCA precedent – which Respondent concedes is directly applicable and yet largely fails to address (Opp. 16-18)[3] – precludes the application of a state liability rule that conflicts with the limitations imposed by the federal jurisdictional statute. *Dalehite v. United States*, 346 U.S. 15, 45 (1953); *Laird v. Nelms*, 406 U.S. 797, 798-99 (1972); *see also* Pet. 25-26. Both *Dalehite* and *Laird* require the application of the "uniform federal limitation . . . . *[r]egardless of state law characterization.*" *Laird*, 406 U.S. at 799. Circuit courts have long applied that rule with respect to section 1346(b)'s scope-of-employment requirement. *See Primeaux*, 181 F.3d at 878; *Pierson v. United States*, 527 F.2d 459, 464 (9th Cir. 1975); *Rodriguez v. United States*, 455 F.2d 940, 942 (1st Cir. 1972); *United States v. Taylor*, 236 F.2d 649, 653 (6th Cir.

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[3] Although Respondent cites a host of FTCA cases, Opp. 17-18, the opposition notably cites only a single case that addresses whether jurisdiction can lie based upon a state liability rule that extends beyond the FTCA's scope-of-employment requirement. That case – *Primeaux v. United States*, 181 F.3d 876 (8th Cir. 1999) (en banc) – *rejected* application of the state liability rule, precisely the result that the Holy See urges here.

1956);[4] *see also Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 424 (1995); *FDIC v. Meyer*, 510 U.S. 471, 477 (1994); *Sheridan v. United States*, 487 U.S. 392, 401 (1988); Pet. 26-27.

In short, contrary to Respondent's assertion, the Ninth Circuit's decision creates conflicts in areas at the heart of FSIA jurisprudence.

II. THE NINTH CIRCUIT'S DECISION UNDERMINES CORE PRINCIPLES OF FOREIGN SOVEREIGN IMMUNITY IGNORED BY RESPONDENT

In addition to creating a number of conflicts, the Ninth Circuit's decision undermines core principles of foreign sovereign immunity, including uniformity, comity, equality and reciprocity. The profound implications of the Ninth Circuit's opinion – ignored in Respondent's opposition – warrant this Court's review.

a. Uniformity: The Ninth Circuit's decision vitiates the FSIA's uniformity, a consequence that Respondent's opposition brief ignores. *See* Opp. *passim*; *cf.* Pet. 28-29.

Prior to the enactment of the FSIA, "sovereign immunity determinations were made in two different branches, subject to a variety of factors, sometimes

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[4] Given that Congress modeled the tort exception on the FTCA, Congress may be presumed to have had knowledge of the prior interpretations of section 1346(b) and intended the FSIA to be interpreted consistently with FTCA precedent. *Bragdon v. Abbott*, 524 U.S. 624, 631, 645 (1998); *Lorillard v. Pons*, 434 U.S. 575, 581 (1978).

including diplomatic considerations. Not surprisingly, the governing standards were neither clear nor uniformly applied." *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 487-88 (1983) (citations omitted). Recognizing that "'a disparate treatment of cases involving foreign governments may have adverse foreign relations consequences[,]'" Congress "acted to bring order to this legal uncertainty" and created uniform standards to resolve foreign sovereign immunity issues. *Republic of Austria v. Altmann*, 541 U.S. 677, 696 (2004) (Kennedy, J., dissenting) (quoting H.R. REP. NO. 94-1487, at 13 (1976)); *see also, e.g.*, H.R. REP. NO. 94-1487, at 32 (discussing "the importance of developing a uniform body of law in this area"). Congress intended the FSIA to "reduc[e] the potential for a multiplicity of conflicting results among the courts of the 50 states." *Verlinden*, 461 U.S. at 497; *see also First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 622 n.11 (1983) (quoting *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 425 (1964)) ("matters bearing on the nation's foreign relations 'should not be left to divergent and perhaps parochial state interpretations.'").

The Ninth Circuit's decision creates the "multiplicity of conflicting results" that the FSIA was intended to eliminate. The conflicting results emerge not because of a failure to apply "federal common law," which, contrary to Respondent's contention, the Holy See nowhere urged in its petition. *See* Opp. 14; *cf.* Pet. *passim*. Rather, conflicting results exist because the Ninth Circuit failed to apply the "detailed federal law standards set forth in the Act[,]" *Verlinden*, 461 U.S. at 494, namely the requirement that the tortious act

itself be within the scope of employment. 28 U.S.C. 1605(a)(5).

The conflicting results are already manifest. Under both Oregon and Kentucky law, sexual abuse of a child is outside the scope of a priest's employment. *Fearing*, 977 P.2d at 1166; *O'Bryan*, 556 F.3d at 385. Yet because the Ninth Circuit refused to apply the federal legal standard set forth in the tort exception and instead applied the "necessary precursor"/"direct outgrowth" approach to jurisdiction, the Ninth Circuit and the Sixth Circuit reached opposite results under the FSIA with regard to identical claims. *Compare* Pet. App. 33a-35a (panel decision) *with O'Bryan*, 556 F.3d at 385. The conflict between the Ninth Circuit and the Sixth Circuit is what can be expected when federal courts permit state liability rules to drive the jurisdictional inquiry in a manner untethered from the standards set forth in the FSIA's exceptions.

The Ninth Circuit's approach also violated section 1606, which provides that "*[a]s to any claim for relief with respect to which a foreign state is not entitled to immunity under section 1605* . . . , the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances . . . ." 28 U.S.C. 1606 (emphasis added); *see also Verlinden*, 461 U.S. at 488-89; Pet. 22-23; *cf.* 28 U.S.C. 1346(b) (incorporating liability standard into jurisdictional inquiry); Pet. 24-25. Beyond repeatedly excising the conditional clause of section 1606, Respondent proffers no explanation as to how the Ninth Circuit's unbridled use of Oregon's vicarious liability rule in the immunity determination itself is consistent with section 1606's plain language. *See* Opp. 7-8; *see also United States v. Menasche*, 348 U.S. 528,

538-39 (1955) (quoting *Montclair v. Ramsdell*, 107 U.S. 147, 152 (1883)) ("It is our duty 'to give effect, if possible, to every clause and word of a statute[.]'").

Federal subject matter jurisdiction under the FSIA must depend upon the uniform and comprehensive standards set forth in the Act – here, the requirement that the tortious act be within the scope of employment – and not on the capacity of state courts and the plaintiffs' bar to develop new theories of liability. *Cf.* Opp. 3-5 (arguing that Oregon's liability rule is justifiable "[i]n light of contemporary knowledge of the dynamics of childhood sexual abuse"). Because the Ninth Circuit's decision profoundly undermines the FSIA's uniformity, certiorari should be granted.

b. **Comity and Equality**: By failing to apply FTCA precedent, the Ninth Circuit's decision flouts international comity. Pet. 26 n.7; *see also Verlinden*, 461 U.S. at 486; *Republic of Philippines v. Pimentel*, 128 S. Ct. 2180, 2190 (2008).

The Ninth Circuit's failure to apply FTCA precedent is also contrary to the basic principle of equality underlying foreign sovereign immunity. *The Schooner Exchange v. McFaddon*, 7 Cranch 116, 136 (1812); *Pimentel*, 128 S. Ct. at 2190. Consistent with the equality principle, many of the FSIA's provisions – including the tort exception – were intended to "place[] the foreign sovereign in a position similar to the domestic sovereign." von Mehren, *The Foreign Sovereign Immunities Act of 1976*, 17 COLUM. J. TRANSNAT'L L. 33, 45 (1978); Belman, *New Departures in the Law of Sovereign Immunity*, 63 AM. SOC'Y INT'L L. PROC. 182, 185, 195 (1969); *see also* H.R. REP. NO. 94-1487, at 21 (tort exception exclusions); *id.* at 25-26

(default judgments); *id.* at 13, 33 (jury trials); *id.* at 21 (maritime exception); *id.* at 25 (time to respond); *id.* at 31 (venue). By treating foreign sovereigns in the manner the U.S. government is treated under federal law, the FSIA "echoe[d] the theme of equality of treatment which has been present for some time in consideration of the foreign sovereign immunity problem." von Mehren, *supra*, at 45; *see also* Lauterpacht, *The Problem of Jurisdictional Immunities of Foreign States*, 28 BRIT. Y.B. INT'L L. 220, 226, 229 (1951); Comment, *The Jurisdictional Immunity of Foreign Sovereigns*, 63 YALE L.J. 1148, 1165 (1954). By failing to apply FTCA precedent here, the Ninth Circuit opinion undermines the equality principle underlying the FSIA.

c. **Reciprocity:** Foreign sovereign immunity derives in part from "'fair dealing'" and "'reciprocal self-interest.'" *Pimentel*, 128 S. Ct. at 2190 (quoting *Nat'l City Bank of N.Y. v. Republic of China*, 348 U.S. 356, 362 (1955)); *see also* Pet. 16-17. By stripping immunity absent a jurisdictionally-significant act that is attributable to the foreign sovereign, the Ninth Circuit's decision marks a radical departure from domestic and international foreign sovereign immunity law. Pet. 15-16; *see also, e.g.*, United Nations Convention on Jurisdictional Immunities of States and Their Property arts. 10-17, *adopted* Dec. 2, 2004, http://untreaty.un.org/English/notpubl/English_3_13.pdf (last visited Oct. 26, 2009) (action or activity by the foreign state, or attributable to the foreign state, required under exceptions to immunity). Such an unprecedented expansion of jurisdiction – which raises the specter that jurisdiction could be found against the U.S. government in foreign courts even in the absence of jurisdictionally-significant attributable conduct –

must be avoided by the federal courts. *See* Feldman, *The United States Foreign Sovereign Immunities Act of 1976: A Founder's View*, 35 INT'L & COMP. L.Q. 302, 302-03 (1986) ("the elaboration of principles of foreign sovereign immunity by national authorities is a viable process only if practised with restraint so that the result commands a sufficient consensus to make the [international] system workable.").

The Ninth Circuit's creation of an expansive "necessary precursor"/"direct outgrowth" approach to jurisdiction also undercuts the principle of reciprocity. Foreign sovereign immunity is an area of growing national and international codification. *See* United Nations Convention on Jurisdictional Immunities of States and Their Property; *see also* State Immunity Act, 1978, c.33 (U.K.); Foreign States Immunities Act, 1985 (Austl.); State Immunity Act, 1985, c. S-18 (Can.); State Immunity Ordinance, 1981 (Pak.); Immunidad Jurisdiccional de los Estados Extranjeros ante los Tribunales Argentinos, Law No. 24.488, May 31, 1995 (Arg.); State Immunity Act, 1985, c.313 (Sing.); Foreign States Immunities Act 87 of 1981 (S. Afr.).[5] Reliance on jurisdictional bases not provided by the United States' foreign sovereign immunity statute creates uncertainty as to the scope of foreign sovereign immunity in the U.S. and abroad.

Because the Ninth Circuit's decision undermines core principles of uniformity, comity, equality and reciprocity, and thereby adds "prospective instability

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[5] The referenced statutes are reproduced in STATE IMMUNITY: SELECTED MATERIALS AND COMMENTARY 329-522 (Dickinson *et al.* eds., 2004).

to the most sensitive area of foreign relations[,]" *Altmann*, 541 U.S. at 715 (Kennedy, J., dissenting), certiorari should be granted.

III. RESPONDENT'S PROCEDURAL POSTURE ARGUMENT IS MOOTED BY THE DISTRICT COURT'S RECENT ORDER DENYING LEAVE TO AMEND

Respondent argues that "the case is currently in a procedural posture that counsels against this Court's review" because Respondent recently filed a motion in the district court for leave to amend the complaint. Opp. 12, 19-20. Respondent's point is now moot, since the district court denied Respondent's motion for leave to amend on October 20, 2009.

There is nothing unusual about the procedural posture of this case. The Court has repeatedly granted certiorari in FSIA cases involving challenges on the face of the complaint. *See Altmann*, 541 U.S. at 681; *Nelson*, 507 U.S. at 352. Indeed, that is the very purpose of the collateral order doctrine – to permit presumptively-immune parties to receive the earliest possible resolution of immunity issues in order to avoid the burdens of litigation. *See, e.g., Mitchell v. Forsyth*, 472 U.S. 511, 524-29 (1985); *United States v. Moats*, 961 F.2d 1198, 1203 (5th Cir. 1992) (stating that foreign sovereign immunity "is an immunity from the burdens of becoming involved in any part of the litigation process, from pre-trial wrangling to trial itself").

CONCLUSION

For the reasons stated above and in the petition, the petition for a writ of certiorari should be granted. Alternatively, the Court should call for the views of the Solicitor General and then grant the petition.

Respectfully submitted,

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October 2009

No. 09-1

In the Supreme Court of the United States

HOLY SEE, PETITIONER

v.

JOHN V. DOE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

The Foreign Sovereign Immunities Act of 1976 (FSIA), 28 U.S.C. 1330, 1602 *et seq.*, establishes that foreign sovereigns are presumptively immune from suit in United States courts, 28 U.S.C. 1604, unless a claim falls within one of the exceptions to immunity enumerated in 28 U.S.C. 1605 and 1607. The tort exception to immunity permits claims against a foreign state based on "the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment." 28 U.S.C. 1605(a)(5).

The question presented is whether Section 1605(a)(5) authorizes a court to exercise jurisdiction over respondent's vicarious liability claim against petitioner, the Holy See, for a priest's sexual abuse committed in Oregon, where sexual abuse is outside the scope of the priest's employment as a matter of Oregon law.

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In the Supreme Court of the United States

No. 09-1

HOLY SEE, PETITIONER

v.

JOHN V. DOE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

INTEREST OF THE UNITED STATES

This brief is filed in response to the Court's order inviting the Solicitor General to express the views of the United States. In the view of the United States, the Court should grant the petition for a writ of certiorari, vacate the judgment of the court of appeals, and remand to the court of appeals for further consideration. In the alternative, the petition for a writ of certiorari should be denied.

STATEMENT

1. Congress enacted the Foreign Sovereign Immunities Act of 1976 (FSIA), 28 U.S.C. 1330, 1602 *et seq.*, to codify the circumstances under which a foreign state may be sued in a civil action in a court in the United States. The FSIA largely codified the so-called restric-

tive theory of foreign sovereign immunity, under which "the sovereign immunity of foreign states should be 'restricted' to cases involving acts of a foreign state which are sovereign or governmental in nature, as opposed to acts which are either commercial in nature or those which private persons normally perform." H.R. Rep. No. 1487, 94th Cong., 2d Sess. 14 (1976) (*1976 House Report*); see *Verlinden B.V.* v. *Central Bank of Nig.*, 461 U.S. 480, 486-488 (1983).

Under the FSIA, the general rule is that "a foreign state shall be immune from the jurisdiction of the courts of the United States." 28 U.S.C. 1604. The statute, however, enumerates certain exceptions to that immunity. 28 U.S.C. 1605, 1607. One such exception permits certain tort suits against a foreign state. 28 U.S.C. 1605(a)(5). In relevant part, the tort exception provides that a foreign state shall not be immune from the jurisdiction of United States courts in any case "in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment."[1] *Ibid.*

If a civil suit falls within one of the FSIA's enumerated exceptions to immunity, a federal court has subject-matter jurisdiction over the suit. 28 U.S.C. 1330(a); see

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[1] The FSIA excludes from the tort exception claims arising from discretionary acts, and those based on certain intentional torts (malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights). 28 U.S.C. 1605(a)(5)(A) and (B). Congress modeled these exclusions on the similar exceptions in the Federal Tort Claims Act (FTCA), see 28 U.S.C. 2680(a) and (h), to the United States' amenability to suit for tort. *1976 House Report* 21.

Argentine Republic v. *Amerada Hess Shipping Corp.*, 488 U.S. 428, 434 (1989). If a foreign state is not immune from suit, the FSIA provides that "the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. 1606.

2. Respondent brought this action for damages in the United States District Court for the District of Oregon, alleging that he was sexually abused by a Catholic priest in the mid-1960s. Pet. App. 69a-73a. Respondent alleged that the priest had abused other children in other parishes before being transferred to the Portland church at which he abused respondent. *Id.* at 138a-140a. The priest had used his position of authority, respondent asserted, in order to gain the trust of respondent and his family, and then, when respondent was a teenager, the priest had molested him. *Id.* at 144a-145a.

Respondent named as defendants the Holy See (the petitioner in this case); the Archdiocese of Portland, Oregon; the Catholic Bishop of Chicago; and the Order of the Friar of Servants. Pet. App. 5a. As relevant here, respondent alleged that petitioner is vicariously liable, under the doctrine of respondeat superior, for the priest's sexual abuse, because "the molestation * * * occurred while [the priest] was acting in the scope of his employment." *Id.* at 147a-148a. Respondent also asserted that petitioner was directly liable for negligence in supervising the priest, *id.* at 149a-150a; and that petitioner fraudulently concealed the priest's previous acts of abuse, *id.* at 150a-152a.

Petitioner moved to dismiss the complaint for lack of subject-matter jurisdiction, arguing that it is entitled to immunity under the FSIA. Pet. App. 8a. Petitioner is recognized as a foreign sovereign by the United States,

and the two states have maintained formal diplomatic relations since 1984. See 1 Office of the Legal Adviser, U.S. Dep't of State, *Pub. No. 10120, Cumulative Digest of United States Practice in International Law, 1981-1988,* at 894 (Marian Nash (Leich) ed., 1993). Accordingly, petitioner is subject to civil suit in United States courts only if the suit comes within one of the exceptions to immunity specified in the FSIA. See, *e.g.*, *O'Bryan* v. *Holy See*, 556 F.3d 361, 374 (6th Cir.), cert. denied, 130 S. Ct. 361 (2009). In response to petitioner's motion to dismiss, respondent argued that the district court had subject-matter jurisdiction under the FSIA's tort exception, 28 U.S.C. 1605(a)(5). Pet. App. 70a.

The district court concluded that it had jurisdiction over respondent's vicarious liability claim pursuant to the FSIA's tort exception. Pet. App. 106a-113a. The court began by noting that the Ninth Circuit had construed Section 1605(a)(5)'s requirement that the tortious act be committed by an "employee * * * while acting within the scope of his office or employment" to equate to a finding that the doctrine of respondeat superior applies to the tortfeasor's act as a matter of state law. *Id.* at 111a (discussing *Joseph* v. *Office of the Consulate Gen. of Nig.*, 830 F.2d 1018, 1025 (9th Cir. 1987), cert. denied, 485 U.S. 905 (1988)).

Applying Oregon law, the court explained that in *Fearing* v. *Bucher*, 977 P.2d 1163, 1166 (1999), the Oregon Supreme Court had held that an employer may be held liable "not only for the torts of his employee when the employee is acting within the scope of his employment, but also for the intentional criminal acts of employees if the acts that lead to the criminal conduct were within the scope of employment." Pet. App. 111a (citations omitted). Thus, *Fearing* held that an employer

could be held vicariously liable for a priest's sexual abuse if that abuse was causally related to conduct—such as a priest's pastoral duties—that was within the priest's scope of employment. *Id.* at 112a.

Because respondent alleged that the sexual abuse arose out of "conduct preceding the sexual abuse [that] fell within the scope of [the priest's] employment," the district court held that the complaint revealed "sufficient grounds upon which to hold [the priest's] employer liable under a theory of respondeat superior." Pet. App. 112a-113a. The court therefore concluded that respondent's vicarious liability claim fell within Section 1605(a)(5)'s tort exception.[2] *Ibid.*

3. Invoking the collateral order doctrine, see *Cassirer* v. *Kingdom of Spain*, 580 F.3d 1048, 1055 (9th Cir. 2009), petitioner appealed the district court's adverse foreign sovereign immunity rulings. Pet. App. 8a-9a, 14a-15a. The court of appeals affirmed the district court's holding that respondent's respondeat superior

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[2] The district court also made other rulings that are not presently before this Court. It held that it had jurisdiction over respondent's negligence claims against petitioner under the tort exception, Pet. App. 113a-128a; that there was no jurisdiction over respondent's fraud claim because such claims are excluded from the tort exception, *id.* at 107a (citing 28 U.S.C. 1605(a)(5)(B)); and that none of respondent's claims fell within the FSIA's commercial activities exception (28 U.S.C. 1605(a)(2)), Pet. App. 105a-106a.

claim could go forward under the tort exception.[3] *Id.* at 29a-35a.

Like the district court, the court of appeals began by observing that the "'scope of employment' provision of the tortious activity exception essentially requires a finding that the doctrine of respondeat superior applies to the tortious acts of individuals" under state law. Pet. App. 31a-32a (quoting *Joseph*, 830 F.2d at 1025). The court explained that the Oregon Supreme Court had held in *Fearing* that although "the priest's 'alleged sexual assaults on plaintiff clearly were outside the scope of his employment' under the traditional test," courts could impose vicarious liability if "acts that *were* within the scope of employment resulted in the acts which led to injury to [the] plaintiff." *Id.* at 33a (brackets in original) (quoting *Fearing*, 977 P.2d at 1166).

According to the court of appeals, "[t]he Oregon Supreme Court has since clarified that *Fearing* created a 'scope of employment' test specifically applicable to intentional torts." Pet. App. 33a. In *Minnis* v. *Oregon Mutual Insurance Co.*, 48 P.3d 137 (Or. 2002), the Ninth Circuit stated, the Oregon Supreme Court "ma[de] clear that, rather than holding that sexual abuse is not within

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[3] The court of appeals reversed the district court's holding that respondent's negligence claim came within the tort exception. Pet. App. 3a-4a; see note 2, *supra*. Respondent cross-appealed the district court's ruling that the FSIA's commercial activity exception did not permit his claims, Pet. App. 15a, but the court of appeals held that it lacked appellate jurisdiction over the cross-appeal. *Id.* at 15a-19a. Neither of these issues is before the Court in the present certiorari petition.

Judge Berzon dissented in part, explaining that she would have held that respondent's negligence claims could go forward under the commercial activity exception. Pet. App. 40a-64a. Judge Fernandez filed a concurring opinion responding to Judge Berzon's partial dissent. *Id* at 64a-68a.

the scope of employment, *Fearing* created an alternative test with respect to the second and third factors of the 'within the scope of employment' standard." Pet. App. 34a. Thus, the Ninth Circuit continued, "[a]n intentional tort is within the scope of employment and can support respondeat superior liability for the employer, if conduct that was within the scope of employment" directly led to the intentional tort. *Ibid.*

Because respondent, like the plaintiff in *Fearing*, alleged that the priest's pastoral activities led to the priest's sexual abuse of respondent, the Ninth Circuit concluded that respondent had adequately alleged "an injury caused by an 'employee' of the foreign state while acting 'within the scope of his . . . employment.'" Pet. App. 34a-35a (quoting 28 U.S.C. 1605(a)(5)). The court of appeals therefore held that the district court had jurisdiction over respondent's claim against petitioner under the tort exception, and it remanded for further proceedings.[4] *Id.* at 35a, 40a.

DISCUSSION

The court of appeals erred in holding that the district court has jurisdiction under the FSIA's tort exception over respondent's claim that petitioner is vicariously liable for sexual abuse committed by a priest. That decision does not merit plenary review because it does not conflict with any decision of this Court or another court

[4] Petitioner also contended that the tort exception did not apply because the priest who committed the acts of sexual abuse was not petitioner's employee, see 28 U.S.C. 1605(a)(5). Pet. App. 30a. The court of appeals held that for purposes of petitioner's motion to dismiss, respondent had sufficiently alleged that the priest was an employee of petitioner. *Id.* at 30a-31a. Petitioner has not challenged that ruling in this Court. See Pet. i. Under the court of appeals' decision, petitioner is free to litigate that issue before the district court on remand.

of appeals. But because the nature of the Ninth Circuit's ruling on the interpretation of the FSIA is unclear and the court did not address a decision of the Oregon Court of Appeals that clarifies the Oregon precedents upon which the Ninth Circuit relied, the Court may wish to grant the petition, vacate the judgment of the court of appeals, and remand to that court for further consideration.

I. THE COURT OF APPEALS ERRED IN HOLDING THAT RESPONDENT'S CLAIM FALLS WITHIN THE FSIA'S TORT EXCEPTION

In the view of the United States, the court of appeals erred in holding that respondent's vicarious liability claim falls within the FSIA's tort exception. Oregon law holds that sexual abuse and similar intentional torts generally do not come within an employee's scope of employment, but that an employer nevertheless may in some circumstances be held vicariously liable for an employee's intentional tort. The Ninth Circuit misunderstood Oregon law, and held that an intentional tort falls within the scope of employment if non-tortious conduct leading to the tort was itself within the scope of employment. Pet. App. 34a. The court also appears to have made a second, interrelated error, for it may have assumed that Section 1605(a)(5)'s scope-of-employment requirement is satisfied any time state law would impose vicarious liability on an employer, whether or not the tort itself was committed by the employee "while acting within the scope of his office or employment." 28 U.S.C. 1605(a)(5); see Pet. App. 31a-32a. Contrary to the court of appeals' apparent assumption, however, the scope-of-employment analysis for purposes of jurisdiction under the FSIA is distinct from the question whether an em-

ployer may be held vicariously liable on the merits. A court may not use a state liability rule to expand the grounds on which the FSIA permits the court to exercise jurisdiction over claims against a foreign sovereign.

A. The Court Of Appeals Erred In Holding That Sexual Abuse Came Within The Priest's Scope Of Employment Under Oregon Law

Under the FSIA's tort exception, a foreign state is not immune from suit in a case in which damages are sought for injuries "caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment." 28 U.S.C. 1605(a)(5). Following circuit precedent, the court of appeals looked to state law to determine whether the alleged tortious act—the priest's sexual abuse—satisfied Section 1605(a)(5)'s scope-of-employment requirement, Pet. App. 31a-32a, and interpreted Oregon law to hold that an intentional tort that is outside the scope of employment comes within the scope of employment if it is causally related to precursor acts that are within the scope of employment.[5] That conclusion is erroneous.

1. Under Oregon law, as in most States, the general rule is that an employer may be held liable for the tortious acts of an employee "[u]nder the doctrine of *respondeat superior*" when "the employee acts within the

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[5] This Court has not addressed whether state or federal law controls the tort exception's scope-of-employment determination. Cf. *Williams* v. *United States*, 350 U.S. 857 (1955) (per curiam) (remanding in a Federal Tort Claims Act case to permit the court of appeals to apply state law in determining whether a government employee was acting within the scope of his employment). That issue is not presented in the petition.

scope of employment." *Chesterman* v. *Barmon*, 753 P.2d 404, 406 (Or. 1988); see generally 1 Restatement (Third) of Agency § 2.04, at 139-142 (2006). In *Chesterman*, the Oregon Supreme Court identified three requirements for finding that an employee was acting within the scope of employment:

> (1) whether the act occurred substantially within the time and space limits authorized by the employment; (2) whether the employee was motivated, at least partially, by a purpose to serve the employer; and (3) whether the act is of a kind which the employee was hired to perform.

753 P.2d at 406.

Subsequently, in *Fearing* v. *Bucher*, 977 P.2d 1163, 1166 (1999), the Oregon Supreme Court provided an additional basis for respondeat superior liability, and departed from the general rule that an employer's respondeat superior liability is co-extensive with an employee's scope of employment. The court thus effectively uncoupled the question whether the tort itself was committed within the scope of employment from the ultimate question whether an employer may be held vicariously liable for that tort, by holding that an employer may be vicariously liable for certain torts committed outside the employee's scope of employment.

In *Fearing*, the court applied the *Chesterman* scope-of-employment inquiry to a plaintiff's claim that an archdiocese should be held vicariously liable for a priest's sexual assault on the plaintiff.[6] The Oregon Supreme Court began by observing that the priest's "alleged sexual assaults on plaintiff clearly were outside

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[6] See *Fearing* v. *Bucher*, 936 P.2d 1023, 1024 (Or. Ct. App. 1997).

the scope of his employment." *Fearing*, 977 P.2d at 1166. The court explained that "in the intentional tort context," however, a court need not determine whether "the intentional tort *itself* was committed in furtherance of any interest of the employer or was the same kind of activities that the employee was hired to perform"—in other words, whether the tortious act itself satisfies the second and third factors in the *Chesterman* scope-of-employment analysis—because such a finding is not "necessary to vicarious liability." *Id.* at 1167. Rather, the court held, the plaintiff could assert a claim of respondeat superior liability if "conduct that was within the scope of [the priest's] employment * * * arguably resulted in the acts that caused plaintiff's injury." *Ibid*; see *id.* at 1166; *Lourim* v. *Swensen*, 977 P.2d 1157, 1160 (Or. 1999) (same).

Applying that standard, the Oregon Supreme Court held that the complaint adequately alleged that the priest's pastoral relationship with the plaintiff—the priest's actions as "youth pastor, spiritual guide, confessor," *Fearing*, 977 P.2d at 1166—satisfied the three *Chesterman* requirements, and was therefore within the scope of the priest's employment. *Id.* at 1166-1167. Because the complaint alleged that the sexual abuse was a "direct outgrowth" of the pastoral relationship, the court held that the "allegations * * * are sufficient to state a claim of vicarious liability." *Id.* at 1168.

More recently, the Oregon Supreme Court explained in *Minnis* v. *Oregon Mutual Insurance Co.*, 48 P.3d 137 (2002), that the *Fearing* analysis applies only when the first *Chesterman* requirement is met: that is, when an employee commits an intentional tort within the time and space limits of employment. *Id.* at 145. In that context, the court may proceed to the second and third

Chesterman requirements; but, the court noted, given that "[e]mployers do not ordinarily hire others for the specific purpose of committing intentional torts, * * * vicarious liability would be defeated in almost every instance under * * * a standard" that focuses on whether the intentional tort itself satisfies those requirements. *Id.* at 144. The Oregon Supreme Court in *Minnis* explained that *Fearing* therefore analyzes whether "the complaint contains sufficient allegations of [employee] conduct that was within the scope of his employment" because it was undertaken to serve the employer's purposes and was of the type for which the employee was hired. *Id.* at 145 (brackets in original). If that conduct in turn led to the tortious act, then the employee's "tortious conduct * * * was sufficiently connected to the employer's purpose to support the employer's vicarious liability." *Ibid.*

2. The court of appeals erred in interpreting *Minnis* to hold that "*Fearing* created an alternative test" under which "[a]n intentional tort *is* within the scope of employment * * * if conduct that was within the scope of employment" was causally related to the intentional tort. Pet. App. 34a (emphasis added). That characterization of Oregon law conflates the scope-of-employment inquiry with the ultimate question whether the employer may be held vicariously liable for the employee's tort. The Oregon Supreme Court in *Fearing* stated unequivocally that the priest's "alleged sexual assaults on plaintiff clearly were outside the scope of employment." 977 P.2d at 1166. Starting from that proposition, *Fearing* altered the liability inquiry for cases involving intentional torts: rather than focusing on "the intentional tort *itself*," a court should instead consider whether the employee engaged in other, non-tortious conduct within

the scope of employment "that arguably resulted in the acts that caused plaintiff's injury." *Id.* at 1167.

Thus, for purposes of determining an employer's vicarious liability for an intentional tort, *Fearing* shifts the focus of the second and third *Chesterman* factors from the tort itself to causally related, non-tortious precursor conduct. But *Fearing* did not thereby redefine what acts are within the scope of employment, nor did it recharacterize the sexual assault in that case as itself coming within the scope of employment, as the Ninth Circuit held. And nothing in *Minnis* supports the Ninth Circuit's interpretation. See 48 P.3d at 144-145 (discussing *Fearing*). Indeed, after oral argument in this case but before the Ninth Circuit issued its decision, the Oregon intermediate appellate court, after reviewing the Oregon Supreme Court's decisions in *Fearing* and *Minnis*, reaffirmed that "sexual assault was not within the scope of [the priest's] employment." *Schmidt* v. *Archdiocese of Portland*, 180 P.3d 160, 177 (Or. Ct. App. 2008), rev'd on other grounds *sub nom. Schmidt* v. *Mt. Angel Abbey*, 223 P.3d 399 (Or. 2009).

Because the alleged sexual abuse in this case did not fall within the scope of the priest's employment as a matter of Oregon law, respondent's suit does not involve a "tortious act or omission * * * of any official or employee of [a] foreign state while acting within the scope of his office or employment." 28 U.S.C. 1605(a)(5). Accordingly, the FSIA's tort exception did not abrogate petitioner's immunity and provide subject-matter jurisdiction over respondent's claim against petitioner for the priest's sexual abuse.[7]

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[7] Had Oregon redefined the scope of employment, as the court of appeals believed, to include intentional torts not intended by the em-

B. The Court Of Appeals Appears To Have Further Erred In Conflating The FSIA's Jurisdictional Scope-Of-Employment Inquiry With The Separate Question Of Respondeat Superior Liability Under State Substantive Law

A second misconception also appears to have contributed to the Ninth Circuit's conflation of the scope-of-employment inquiry for FSIA jurisdictional purposes and the distinct question whether vicarious liability could be imposed under Oregon law. The Ninth Circuit characterized the "'scope of employment' provision of the tortious activity exception" as "essentially requir[ing] a finding that the doctrine of respondeat superior applies to the tortious acts of individuals." Pet. App. 31a-32a (quoting *Joseph* v. *Office of the Consulate Gen. of Nig.*, 830 F.2d 1018, 1025 (9th Cir. 1987), cert. denied, 485 U.S. 905 (1988)). That statement suggests that the court of appeals assumed that Section 1605(a)(5) does not require that the employee's tort itself have been committed while the employee was acting within the scope of employment, but rather requires only that the employer may be held vicariously liable for the tort of its employee as a matter of state substantive

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ployee to serve the employer's purpose, that rule would be a departure from the traditional understanding of acts within the scope of employment. Cf., *e.g.*, 1 Restatement (Second) of Agency § 228(2), at 504 (1958); *id.* § 229, at 506; *id.* § 229 cmt. b, at 508; *id.* § 229 cmt. f, at 511; cf. also 2 Restatement (Third) of Agency § 7.07 cmt. b, at 201 (2006). Such a departure might raise the question whether Congress intended to permit the application of such an atypical understanding of scope of employment under Section 1605(a)(5). That question is not, however, presented here.

tort law.[8] Thus, the court of appeals apparently believed that it could look to state-law liability rules to determine whether the tort exception should apply, without regard to whether the tort was within the scope of the priest's employment.[9] As petitioner argues (Pet. 22-24), that view is mistaken.

The FSIA establishes a rule of liability under which a foreign state will be liable "in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. 1606. But that rule of liability applies only "[a]s to any claim for relief with respect to which a foreign state is not entitled to immunity under section 1605 or 1607" of the FSIA. *Ibid.*; see Pet. 22. Oregon has chosen as a matter of its substantive law to impose vicarious liability in certain circumstances on an

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[8] That reading of the court of appeals' opinion is reinforced by the next sentence in the opinion, which states: "[T]he Oregon Supreme Court has directly addressed whether a church can be liable under respondeat superior for the actions of a priest who sexually assaults a parishioner." Pet. App. 32a (discussing *Fearing*).

[9] The court of appeals elsewhere stated that it believed that, under Oregon law, sexual abuse was within the scope of employment if the tort resulted from precursor conduct that was within the scope of employment. Pet. App. 34a; see also *id.* at 4a (observing that respondent had "sufficiently alleged" that the priest was an employee of petitioner "acting within the 'scope of his employment' under Oregon law"). Those statements might suggest that the court correctly believed that the FSIA's tort exception requires the alleged tortious acts to have been within the scope of employment, see 28 U.S.C. 1605(a)(5). But the court's error as to state law—its conflation of the scope-of-employment determination and the ultimate question of respondeat superior liability—may also have been the result of the court's making a similar error with respect to the FSIA: construing the FSIA's scope-of-employment jurisdictional prerequisite as interchangeable with "a finding that the doctrine of respondeat superior applies to the tortious acts," Pet. App. 31a-32a (quoting *Joseph*, 830 F.2d at 1025).

employer for its employee's intentional tort even if the tort itself was committed outside the scope of employment. But a foreign sovereign may be found liable under that substantive rule only if the court first determines that it has jurisdiction over the foreign state because the plaintiff's claim comes within the tort exception to sovereign immunity. That exception authorizes suit against a foreign state for a tort by the state's employee only if the employee committed the tort "while acting within the scope of his office or employment." 28 U.S.C. 1605(a)(5); cf. *Primeaux* v. *United States*, 181 F.3d 876, 878 (8th Cir. 1999) (en banc) ("[E]ven if state law extends a private employer's vicarious liability to employee conduct not within the scope of employment, the government's [Federal Tort Claims Act] liability remains limited to employee conduct within the scope of employment, as defined by state law."), cert. denied, 528 U.S. 1154 (2000).

To the extent that the Ninth Circuit equated the FSIA tort exception's scope-of-employment jurisdictional requirement with broader state-law respondeat superior liability, it erred.[10] Because the priest's alleged sexual abuse of respondent was not within the scope of the priest's employment, respondent's vicarious liability claim does not come within the FSIA's tort exception to foreign sovereign immunity, and petitioner may not be

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[10] In equating the two concepts, the court of appeals relied on *Joseph*'s statement that the tort exception "essentially requires a finding that the doctrine of respondeat superior applies to the tortious acts of individuals." 830 F.2d at 1025. But *Joseph*'s actual holding was that the plaintiff's claims fell within the tort exception because the conduct at issue was within the employee's scope of employment under state law. *Id.* at 1025-1026.

subject to suit for that claim under Oregon's respondeat superior liability rule.

II. THE COURT SHOULD REMAND FOR FURTHER CONSIDERATION OF WHETHER THE DISTRICT COURT HAS JURISDICTION OVER RESPONDENT'S VICARIOUS LIABILITY CLAIM UNDER THE FSIA'S TORT EXCEPTION

The court of appeals erred in holding that respondent's claim fell within the FSIA's tort exception to foreign sovereign immunity. Although the decision does not merit plenary review, the Court may wish to grant the petition, vacate the judgment of the court of appeals, and remand to that court for further consideration.

A. Plenary review is not warranted at this time. The court of appeals' decision does not conflict with any decision of another court of appeals. Petitioner asserts that *O'Bryan* v. *Holy See*, 556 F.3d 361, 385 (6th Cir.), cert. denied, 130 S. Ct. 361 (2009), is "inconsistent" with the decision below, in that it found the tort exception inapplicable because Kentucky law held that the sexual abuse in that case was outside the scope of a priest's employment. Reply Br. 3-4. But that decision does not create a circuit conflict. The Sixth Circuit was interpreting Kentucky, not Oregon, law. And unlike Oregon, Kentucky does not consider precursor conduct in determining whether tortious conduct not within the scope of employment may subject an employer to respondeat superior liability. See *O'Bryan*, 556 F.3d at 383. To the extent that the Ninth Circuit's decision rested primarily on its misinterpretation of Oregon state law, then, the decision does not conflict with *O'Bryan*, and in any event, a court of appeals' construction of state law does not ordinarily merit plenary review. See generally Eu-

gene Gressman et al., *Supreme Court Practice* 260-262 (9th ed. 2007) (Gressman).

The Ninth Circuit's decision in this case also appears to have rested on a misunderstanding of the scope of the FSIA's tort exception to foreign sovereign immunity, but that misapprehension likewise does not create a conflict with *O'Bryan*. Because the Sixth Circuit concluded that the sexual assault was not within the scope of employment under Kentucky law, that court had no occasion to consider whether the tort exception permits jurisdiction based on torts that are not within the scope of employment but nonetheless may be the basis for respondeat superior liability under state tort law. Nor does petitioner contend that Oregon's expansive rule permitting respondeat superior liability for torts that are not themselves within the scope of employment has been widely adopted by other States, such that the question of the interaction of such rules with Section 1605(a)(5) is likely to recur with frequency.[11] Reply Br. 2-4, 7.

The court of appeals' decision also does not directly conflict with this Court's precedent. See Pet. 18-21, 24-28. The decision below, at some level of generality,

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[11] Petitioner observes that the FSIA's tort exception is modeled on the FTCA, which provides jurisdiction over claims against the United States based on the negligent or wrongful acts of a federal employee "while acting within the scope of his office or employment" under circumstances in which a private person would be liable. 28 U.S.C. 1346(b)(1); Pet. 24-25; Reply Br. 4-5; see note 1, *supra*; *Primeaux*, 181 F.3d at 878 (FTCA liability is limited to "employee conduct within the scope of employment," even if state-law vicarious liability rule is more expansive.). Because the decision below concerns only the FSIA, however, it does not squarely conflict with any decision on the FTCA, and does not provide a vehicle to review the scope of the FTCA's scope-of-employment requirement.

might be regarded as in tension with this Court's decisions instructing that courts should not expand the FSIA's exceptions to foreign sovereign immunity beyond the boundaries set by Congress. See *Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U.S. 428, 441 (1989) (Because Section 1605(a)(5) requires that the injury have occurred in the United States, the tort exception is not satisfied by a non-domestic tort with domestic effects.); *Saudi Arabia* v. *Nelson*, 507 U.S. 349, 362-363 (1993) (refusing to extend the commercial activity exception to cover tortious acts that were preceded by commercial acts); *Republic of Argentina* v. *Weltover, Inc.*, 504 U.S. 607, 618 (1992) (strictly construing commercial activity exception's "direct effect" prong); see also Pet. 18-20. But that type of tension is not the sort of direct conflict that typically warrants the Court's plenary review. See generally Gressman 250-251.

B. Nevertheless, in the view of the United States, it may be appropriate for this Court to grant the certiorari petition, vacate the court of appeals' judgment, and remand for further consideration.

The court of appeals held that the FSIA's tort exception permits jurisdiction over a claim that falls outside the bounds established by the exception's plain text: a claim based on tortious conduct that was not committed within the scope of employment. A central purpose of foreign sovereign immunity is to afford foreign states "some present 'protection from the inconvenience of suit,'" unless the case comes within a statutory exception to immunity. *Republic of Austria* v. *Altmann*, 541 U.S. 677, 696 (2004) (emphasis omitted) (quoting *Dole Food Co.* v. *Patrickson*, 538 U.S. 468, 479 (2003)). That purpose is defeated if a foreign sovereign is forced to litigate on the merits a case in which no applicable

exception to immunity applies.[12] See, *e.g.*, *Foremost-McKesson, Inc.* v. *Islamic Republic of Iran*, 905 F.2d 438, 442-443 (D.C. Cir. 1990). Because improperly subjecting a foreign state to suit can in some circumstances raise foreign-relations and reciprocity concerns, the United States has an interest in ensuring that courts in the United States carefully apply the FSIA, and that they do not expand the exceptions to foreign sovereign immunity set forth in Section 1605 beyond the scope that Congress intended.

In a similar situation—where the court of appeals had plainly "committed error that was essential to its judgment" denying immunity under the FSIA—this Court has granted certiorari, vacated the judgment below, and remanded for further consideration. *Ministry of Def. & Support for Armed Forces of Islamic Republic of Iran* v. *Elahi*, 546 U.S. 450, 453 (2006) (per curiam) (granting, vacating, and remanding for reconsideration because "the Ninth Circuit either mistakenly relied on a concession by respondent that could not possibly bind petitioner, or else erroneously presumed that there was no relevant distinction between a foreign state and its agencies or instrumentalities for purposes of" the immunity from attachment of foreign sovereign property). The Court may wish to make a similar disposition here.

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[12] To be sure, if petitioner ultimately prevails on remand in its argument that the priest who allegedly committed the acts of abuse was not petitioner's employee, the tort exception will not apply and petitioner will be entitled to immunity. See note 4, *supra*; Pet. App. 30a-31a. Thus, if petitioner chooses to litigate the employee issue on remand, the parties may have to engage in discovery on the issue, even though the court should have concluded that the tort exception does not apply regardless of the priest's employment status.

The court of appeals, in addition to premising its finding of jurisdiction on conduct that is outside the scope of employment as a matter of state law, appears to have also misapprehended the scope of the FSIA's tort exception to foreign sovereign immunity as a matter of federal law. See pp. 14-17, *supra*. It therefore would be appropriate for this Court to correct any such error by making clear that Section 1605(a)(5) authorizes suit against a foreign state for a tort by the state's employee only if the tort itself was committed by the employee while acting within the scope of his office or employment. The Court could then remand to the court of appeals for further consideration in light of that ruling on the interpretation of the FSIA and also in light of the decision of the Oregon Court of Appeals in *Schmidt* concluding (based on *Fearing*) that sexual abuse is not within the scope of a priest's employment.[13] Or the Court could simply vacate the judgment of the court of appeals and remand to afford that court an opportunity to clarify its interpretation of the FSIA's tort exception in the first instance and to permit further consideration in light of *Schmidt*. If the Court does not choose to vacate and remand, however, it should deny certiorari, because this case does not warrant plenary review.

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[13] *Schmidt* was decided after the Ninth Circuit heard oral argument in this case and was not addressed in the Ninth Circuit's decision.

CONCLUSION

The petition for a writ of certiorari should be granted, the judgment of the court of appeals vacated, and the case remanded to the court of appeals for further consideration as set forth in this brief. In the alternative, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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